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# AWAY FROM WAIVER: A RATIONALE FOR THE FORFEITURE OF CONSTITUTIONAL RIGHTS IN CRIMINAL PROCEDURE

*Peter Westen**†

Ten years ago, when I was a student in law school, I learned that it was difficult for a criminal defendant to lose completely his right to assert constitutional defenses. The only way he could relinquish his constitutional defenses, I was told, was by actually "waiving" them. Moreover, in order to establish that a defendant had waived his defenses, the state faced a rigorous test: it had to show, in the famous phrase, that his waiver was "knowing, intelligent, and voluntary."[1] In other words, before the state could permanently prevent a defendant from asserting constitutional defenses, it had to show that he made a deliberate decision to forgo these defenses, that he made the decision after being fully apprised of the consequences and alternatives, and that the state itself had done nothing to make a decision to assert his rights more "costly" than a decision to relinquish them.

Today things are different. Law students now learn that a defendant can lose his constitutional defenses not only by waiving them, but also by "forfeiting" them. The significant difference between waiver and forfeiture is that a defendant can forfeit his defenses without ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them. Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind.

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† If it were customary to dedicate articles, I would dedicate this piece to my colleagues, Jerry Israel, Yale Kamisar, and Terry Sandalow, who first opened my eyes to the differences between "waiver" and "forfeiture." I am also especially grateful to Jerry Israel and Richard Lempert for their thoughtful comments on earlier drafts of the article; they have not only enriched my understanding of criminal procedure, but, by their generous gifts of time and thought, have helped make this a law faculty where collegial scholarship is both a possibility and a joy.

1. The classic formulation of the waiver doctrine is in Johnson v. Zerbst, 304 U.S. 458, 464 (1938): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Everyone's favorite article on waiver, and still the most provocative treatment of the subject, is Tigar, *The Supreme Court, 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

A good example is the loss of constitutional defenses that occurs by law when a defendant enters a plea of guilty; another is the loss of constitutional defenses that occurs by rule when a defendant fails to assert his defenses in a timely fashion before trial.

To my knowledge, however, no one has yet satisfactorily identified the constitutional rationale for forfeiture or explained the connection between forfeiture and waiver. This lack of understanding immediately raises a host of questions. Why, when we are so concerned about the circumstances surrounding the waiver of even a single constitutional right, do we casually condone the wholesale loss of rights by forfeiture? Is there something unique about the nature of a guilty plea that justifies forfeiture in that context, or are there similar considerations that would justify it elsewhere? Are *all* rights forfeited by a guilty plea, or are there some constitutional rights that, by their very nature, cannot be forfeited? If some rights cannot be forfeited by a plea of guilty, can they nonetheless be forfeited by other procedural devices? Finally, if some constitutional defenses cannot be forfeited, can they nonetheless be waived?

This essay is an informal attempt to explore these questions. I begin by trying to identify the rule that distinguishes those constitutional rights that can be forfeited by a plea of guilty from those, if any, that cannot be forfeited; from that rule I attempt to derive some general principles to explain forfeiture in the context of a guilty plea. Next, having formulated a tentative rationale for forfeiture in that context, I test the rationale in other contexts by determining what rights a defendant who stands trial can (and cannot) forfeit by failing to assert them in a timely fashion. Finally, I explore the relationship between the concept of forfeiture and the apparently independent notion of waiver.

## I. The Forfeiture of Defenses by Plea of Guilty

The law of forfeiture has developed more fully in regard to guilty pleas than in other areas of criminal procedure. It was in connection with a guilty plea that the modern Supreme Court first held that a defendant can permanently forfeit constitutional defenses without ever having made a deliberate decision to waive them; yet, it was also in this connection that the Court first held that there are certain rights that cannot be constitutionally forfeited. It should be fruitful, therefore, to begin this analysis of forfeiture with an inquiry into the rule that distinguishes those rights that can be constitutionally forfeited by a plea of guilty from those that cannot.

### A. *Forfeiture by Plea of Guilty: The Rule*

#### 1. *The Early Guilty Plea Cases*

During a three-year period beginning in 1970 with the decisions in the *Brady* trilogy,[2] the Supreme Court held in a series of cases that a defendant who pleads guilty may lose the right thereafter to raise constitutional defenses to his conviction, even though he was unaware of the defenses at the time he entered his plea. A good example of the operation of this principle is found in *Tollett v. Henderson.*[3] The defendant in *Tollett,* who was black, pleaded guilty to first degree murder and was sentenced to ninety-nine years in prison. Twenty years later, he petitioned for habeas corpus, arguing that his conviction should be set aside because of a constitutional defect in the racial composition of the grand jury that had indicted him. He contended that he had not waived the grand jury defense in any traditional sense, because neither he nor his lawyer had been aware of it at the time he entered his plea. He further argued that, even if they had been aware of it, his lawyer, who was white, would not have been wholly free to assert the claim of racial discrimination without fear of official reprisal. The Supreme Court conceded that the indictment to which the defendant had pleaded guilty was constitutionally defective. Nonetheless, it rejected his claim, holding that even though the defendant had not waived the defense in the traditional fashion, he had forfeited it by pleading guilty:

> If the issue were to be cast solely in terms of "waiver," the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of the claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.[4]

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2. The "*Brady* trilogy" refers to three companion cases in which the Supreme Court for the first time gave constitutional approval to the practice of plea bargaining and to the notion of forfeiture. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). For a scholarly description and criticism of the *Brady* trilogy, see Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea,* 47 U. COLO. L. REV. 1 (1975). Professor Alschuler assumes that these decisions must be understood in the traditional terms of waiver; accordingly, since the cases cannot be explained in such terms, he concludes that the decisions are fundamentally unsound. Although I obviously disagree with both his assumption and his conclusion, Professor Alschuler's views deserve thoughtful consideration by everyone interested in these questions.

3. 411 U.S. 258 (1973).

4. 411 U.S. at 266. It is significant that Justice White (who authored the trilogy opinions for the Court) has also stated that the *Brady* trilogy did *not* rest on notions

Two significant conclusions emerge from these guilty plea cases. First, although the Court was never very explicit on this point, it did not seem to hold that the entry of a guilty plea *requires* the forfeiture of constitutional defenses, or that the Constitution itself prohibits the state or federal courts from providing for the survival of such defenses as a matter of domestic law. Rather, the Court apparently took the more limited position that, if a state or federal court determines as a matter of domestic law that a plea of guilty is final and that a defendant who enters such a plea in its courts thereby forfeits his defenses, then the Constitution does not disallow the forfeiture—even with respect to defenses that are constitutional in origin. Thus, the state and federal courts are apparently free to decide that a plea of guilty in their courts shall *not* operate as a forfeiture of defenses: that is wholly a matter of domestic law on whch the Constitution itself has nothing to say, one way or another. Hence the effect of a guilty plea depends first upon whether (and to what extent) the domestic law provides for a forfeiture of defenses following such a plea; only then can one determine whether the domestic law of forfeiture is constitutional.[5]

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of "waiver":

> [T]he [majority] contentions assume that the *Brady* trilogy was based upon notions of waiver. In other words, it assumes that this Court has in the past refused to set aside "guilty pleas" on the basis of antecedent violations of constitutional rights only because the plea was deemed to have "waived" those rights. This assumption finds some support in the language of those cases, but *waiver was not their basic ingredient.*

Lefkowitz v. Newsome, 420 U.S. 283, 299 (1975) (White, J., dissenting) (emphasis added). If, as I believe, the Court is correct in stating that its guilty plea cases can be explained on grounds other than waiver, then it is almost irrelevant that the decisions cannot also be squared with traditional notions of waiver. Some commentators, however, criticize the *Brady* trilogy for failing to satisfy traditional notions of waiver. *See* Alschuler, *supra* note 2, at 41; Tigar, *supra* note 1, at 4 ("Taken together, they [the *Brady* trilogy] lead me . . . to conclude that the earlier search for reasoned and consistent principles of waiver is now put to full flight . . ."); and Note, *The Guilty Plea as a Waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the Brady Trilogy*, 74 COLUM. L. REV. 1435 (1974) ("The *Brady* trilogy's rule of waiver strains, perhaps irreconcilably, traditional concepts of waiver . . ."). *See also* McMann v. Richardson, 397 U.S. 759, 782, 785 (Brennan, J., dissenting).

5. This view finds support in Lefkowitz v. Newsome, 420 U.S. 283 (1975). The defendant in *Lefkowitz* pleaded guilty in a jurisdiction that provided as a matter of state law that a defendant may plead guilty without forfeiting the right to appeal his conviction on the ground that evidence to be used against him had been seized in violation of the fourth amendment. After exhausting his state appeals, the defendant petitioned for federal habeas corpus, contending that his conviction should be set aside on fourth amendment grounds; the state argued in response that, for purposes of federal habeas, the defendant had waived his fourth amendment claim by pleading guilty. The Supreme Court ruled for the defendant, holding that, even in the context of federal habeas corpus, it was *state* law that defined the preclusive effect of the guilty plea on the defendant's constitutional defenses. *Lefkowitz* is significant for our purposes because, obviously, if state law was controlling for pur-

The second conclusion to be drawn from these cases is that the Court, by the end of 1973, was apparently prepared to hold that a plea of guilty could constitutionally operate as a forfeiture of *all* defenses to conviction except those relating to the procedures and circumstances under which the plea itself was entered. Thus, a guilty plea could operate as a forfeiture not only of defenses that would have become moot had the defendant gone to trial (defenses concerning the composition of the indicting grand jury, for example), but also of defenses concerning the procedures and evidence by which he would have been tried on a plea of "not guilty."[6] Forfeiture could occur without regard to whether the defendant had benefited from the defense in the course of plea bargaining.[7] It could occur regardless of whether the defendant knew, or should have known, or could ever reasonably have known about his defenses,[8] and regardless of whether the constitutional defect "caused" him to plead guilty.[9]

In short, except for constitutional defects in the very proceeding at which the guilty plea is entered and defects in the advice of coun-

poses of federal habeas, it must also have been controlling for constitutional purposes; otherwise, there would have been no federal claim left for the federal court to review by writ of habeas corpus. Indeed, the state in *Lefkowitz* agreed that, as a *constitutional* matter, it was state law that defined the preclusive effect of the guilty plea for purposes of direct review by the Supreme Court; the state merely disagreed with the defendant on whether, as a statutory matter, the state law should also be deemed controlling for purposes of federal habeas corpus. *See* 420 U.S. at 290 n.6. *But cf.* 420 U.S. at 294-302 (White, J., dissenting) (arguing that *federal* law controlled the case and provided the defendant with no right to overturn his guilty plea).

6. *Compare* Tollett v. Henderson, 411 U.S. 258 (1973) (grand-jury defense), *with* McMann v. Richardson, 397 U.S. 759 (1970) (a coerced-confession defense). Professor Alschuler believes the Court should have adopted this distinction between defenses that are or are not mooted by conviction at trial to distinguish *Tollett* from *McMann*. Alschuler, *supra* note 2, at 29.

7. *Compare* McMann v. Richardson, 397 U.S. 759 (1970) (where there may have been plea bargaining over the alleged defense), *with* Tollett v. Henderson, 411 U.S. 258 (1973) (where there was no such bargaining). Justice Marshall unsuccessfully urged the Court to distinguish *Tollett* from *McMann* on this basis. *See* 411 U.S. at 270-71 (Marshall, J., dissenting).

8. *Compare* Parker v. North Carolina, 397 U.S. 790 (1970) (where the defendant or his lawyer should have been aware of the fifth amendment defense), *with* Brady v. United States, 397 U.S. 742 (1970) (where neither the defendant nor his lawyer could have anticipated the then nonexistent defense that the death penalty imposed by the statute was unconstitutional). Professor Alschuler believes the Court should have adopted this distinction. Alschuler, *supra* note 2, at 40-41. *Cf.* Davis v. United States, 411 U.S. 233, 254-55 (1973) (Marshall, J., dissenting) (arguing against forfeiture of defenses absent deliberate and informed waiver).

9. *Compare* Brady v. United States, 397 U.S. 742 (1970) (where the lower court found that the defect had no effect on the defendant's decision to plead guilty), *with* McMann v. Richardson, 397 U.S. 759 (1970) (where the Court assumed that the defendant would not have pleaded guilty except for the defect). Justice Brennan has unsuccessfully urged the Court to adopt this distinction. *See* Parker v. North Carolina, 397 U.S. 790, 799-816 (1970) (Brennan, J., dissenting).

sel with respect to defendants represented by counsel,[10] the Court seemed to suggest that a guilty plea could operate as a forfeiture of *all* constitutional defenses to conviction. Not surprisingly, one commentator was led to conclude that "[*a*]*ll* the bulwarks of the fortresses of defenses are abandoned by the plea of guilty."[11] This was also the position of Chief Justice (then Judge) Burger: "[I]f voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law."[12] Or, as another court stated, "[a] guilty plea is normally understood as a lid on the box, whatever is in it. . . ."[13]

### 2. *The Meaning of* Blackledge v. Perry

Despite the implications of these earlier cases, in *Blackledge v. Perry*[14] the Court explicitly held that certain defenses *cannot* be constitutionally forfeited by a plea of guilty. The defendant in *Perry*, having been convicted and sentenced to six months in prison by an inferior court in North Carolina for the misdemeanor of armed assault, took a de novo appeal as of right to a court of general jurisdiction. Before Perry could proceed with appeal, however, the

10. The Court will review guilty pleas to insure that the constitutional formalities have been observed at the arraignment itself. *See* Boykin v. Alabama, 395 U.S. 238 (1969). The loss of antecedent defenses is ignored, however, except for the few that the arraigning judge is required to enumerate to the defendant; and even with respect to those, the notice the defendant must receive is very general. *Cf.* Johnson v. Ohio, 419 U.S. 924, 926 (1974) (Douglas, J., dissenting to a denial of certiorari in a case claiming lack of notice).

The Court will also review guilty pleas by defendants represented by counsel, at least where counsel is appointed rather than retained, to insure that the defendant received competent legal assistance. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970). In assessing such competence, however, the court is not concerned with whether the lawyer recognized or apprised his client of his constitutional defenses, but only with whether the lawyer's *advice with respect to the plea* was within the range of competence demanded of attorneys in criminal cases: "The focus of federal habeas inquiry is the nature of the advice . . . not the existence as such of an antecedent constitutional infirmity." Tollett v. Henderson, 411 U.S. 258, 266 (1973). "Thus, while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief". 411 U.S. at 267.

11. Bishop, *Waivers and Pleas of Guilty*, 60 F.R.D. 513, 525 (1974) (emphasis added). *See id.* at 520: "The 'sudden death' finality of a valid guilty plea is that it waives all constitutional rights and *all* defenses" (citations omitted, emphasis original).

12. Edwards v. United States, 256 F.2d 707, 709 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958).

13. United States v. Bluso, 519 F.2d 473, 474 (4th Cir. 1975).

14. 417 U.S. 21 (1974). I hope to show in the course of this article that there is a principled explanation for the decision in *Blackledge*. *See* text at notes 29 & 44-49 *infra*. *But see* Note, *supra* note 4, at 1454-58.

prosecutor filed a superseding charge against him in the higher court, charging Perry with a felony offense based on the same conduct for which Perry had already been tried and convicted. Instead of proceeding to trial, Perry pleaded guilty to the felony and was sentenced to five to seven years in prison. Several months later, Perry petitioned for relief from his conviction arguing that the prosecutor had deprived him of due process by charging him with a felony in response to his de novo appeal of the misdemeanor conviction. The state responded that even if there were merit to the due process claim, Perry had forfeited it by pleading guilty.

The Supreme Court agreed with Perry that the prosecutor had violated due process in responding to Perry's de novo appeal by charging him with a greater offense. More important, the Court also agreed with Perry that he was free to raise the due process claim as a defense to his conviction despite his plea of guilty. The Court distinguished its prior decision in *Tollett* on the ground that the constitutional claim there was one that could have been "cured," while the claim in *Blackledge* "went to the very power of the State to bring the defendant into court":

> While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* . . . were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. . . . [E]ven a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. . . . Unlike the defendant in *Tollett*, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him in the Superior Court thus operated to deny him due process of law.[15]

What then is the rule in *Blackledge* for distinguishing forfeitable defenses from nonforfeitable defenses? There appear to be several possibilities. Thus, perhaps it is the rule that a defendant who has been convicted on a plea of guilty may later challenge his conviction on any constitutional ground that, if asserted before trial and left uncorrected, would have left the state with "no power" to obtain a valid conviction against him at trial. But, as Justice Rehnquist demonstrated in his dissent in *Blackledge*, if this were the rule, even the

15. 417 U.S. at 30-31 (citation omitted).

defense in *Tollett* would have survived forfeiture: the defendant there claimed that the indictment on which he was arraigned was constitutionally defective; if his claim had been raised before trial and left uncorrected, the state could never have obtained a valid conviction against him at trial. Indeed, in that sense, *every* constitutional defense should survive forfeiture because every defense that is asserted in a timely fashion and left uncorrected denies the state the "power" to convict.[16]

Another possible formulation of the *Blackledge* rule is that a defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that would preclude the state from obtaining a valid conviction without regard to whether the defendant asserts it as a defense. The trouble with this formulation of the rule in *Blackledge* is that it goes too far, for one can scarcely think of a constitutional claim that precludes the state from obtaining a valid conviction without regard to whether the defendant himself asserts it as a defense.[17] To be sure, as a matter of domestic law, a state may choose to provide that certain defenses (such as those relating to subject-matter jurisdiction) are cognizable by a court on its own motion, without regard to whether a defendant chooses to assert them, on the ground that the state has an interest in having them raised. In a sense, it may be said that defenses of this kind leave the state with no "power" to obtain a valid conviction. But that cannot be said of the constitutional defense asserted in *Blackledge*, or any other *constitutional* defense for that matter, for the defenses the Constitution creates are "personal" to the defendant and, as such, can

16. If the Court is correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the State lacked the very power to bring him to trial, I believe this case is governed by cases culminating in *Tollett v. Henderson*, 411 U.S. 258 (1973). In that case the State no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea.
417 U.S. at 35 (Rehnquist, J., dissenting).

17. I, for one, cannot readily think of a personal constitutional right that is incapable of being waived by a competent defendant under at least some circumstances. To be sure, there are some rights, such as the defendant's right to trial by jury, that the defendant is not free to waive in federal cases, because they are rights that the prosecution may assert over his objection. *See* Singer v. United States, 380 U.S. 24 (1965). But there is nothing in the *Constitution* that makes such rights nonwaivable. Rather, to the extent rights are derived from the Constitution, such as the right to trial by jury, a defendant is always free to waive them. *See* Patton v. United States, 281 U.S. 276 (1930). Thus, insofar as there is a rule that prevents a defendant from waiving his right to trial by jury without the prosecutor's consent, it is a rule derived not from the Constitution, but from domestic federal law and is designed to protect the public rather than the defendant. *See* Singer v. United States, 380 U.S. at 36. Moreover, insofar as there is any further rule that prevents a defendant from waiving his right to trial by jury even with the prosecution's consent, it, too, derives its authority from the *domestic* law. *Cf.* FED. R. CRIM. P. 7 (the defendant may waive his right to be indicted by grand jury in most cases, but not in cases punishable by death).

be asserted only by him or by others on his behalf.[18] Thus, any rule that precludes a defendant from surrendering such defenses, or that directs a court to notice them on its own motion over the defendant's objection, has its source not in the Constitution, but in some principle of domestic law. Accordingly, if the rule were that a defendant forfeits all defenses except those that a court may notice on its own motion, the rule would preclude a defendant from asserting any defense that is derived solely from the Constitution, including the due process defense in *Blackledge*.[19]

A third possible formulation of the *Blackledge* rule was recently advanced in *Menna v. New York*,[20] in which the Court suggested that a defendant convicted on a plea of guilty may challenge his conviction on any constitutional ground that would prevent the state from obtaining a valid conviction even where the defendant is conceded to be *factually guilty* of the offense. The defendant in *Menna*, having once been held in contempt for refusing to testify before a grand jury on several occasions, was thereafter indicted for refusing to testify before the grand jury on one particular occasion. Instead of contesting the charge, the defendant pleaded guilty but then appealed on the ground that he had been twice held in jeopardy for the same act of contempt. Without reaching the issue of double jeopardy, the highest state court affirmed the conviction on the ground that the defendant had "waived" his claim by pleading guilty. The Supreme Court, in turn, summarily reversed the conviction with a three-page per curiam opinion which held that under *Blackledge* a defendant has a constitutional right to challenge a guilty plea on double jeopardy grounds because the defense is one that would have

18. *See* Faretta v. California, 422 U.S. 806, 818-21, 834 (1975). Indeed, to say that a right is "personal" to the defendant may be the same thing as saying that it is designed to protect only his interests, and that he alone can assert it. Of course, that is very different from saying that he has a *constitutional right* to waive it: the fact that a defendant is constitutionally capable of waiving a right under certain circumstances does not mean that he has a constitutional right to waive it. Even in *Faretta* the Court did not hold that the right-to-counsel clause itself gives the defendant a constitutional right to waive counsel; rather, the Court held that he had a right to waive counsel only because the sixth amendment contained an independent and implicit right—wholly apart from the right to counsel—giving the defendant the right to represent himself.

19. In *Blackledge* the Court discussed the due-process defense as if it were closely analogous to the defense of double jeopardy. 417 U.S. at 31. But, as Justice Rehnquist pointed out, the defense of double jeopardy can be waived. 417 U.S. at 35 (Rehnquist, J., dissenting). Indeed, in Menna v. New York, 423 U.S. 61 (1975), after apparently conceding that the defense of double jeopardy is waivable, the Court held that double jeopardy *is not* forfeited by a plea of guilty. 423 U.S. at 62 n.2. Thus, this suggested distinction between "waivable" and "nonwaivable" defenses cannot be the principle that explains the rule in *Blackledge*.

20. 423 U.S. 61 (1975) (per curiam).

precluded the state from ever obtaining a valid conviction against him. In a footnote, however, the Court went on to say that the guilty plea cases stand for the proposition that a guilty plea is a conclusive admission of factual guilt and, as such, can operate as a forfeiture only of those defenses that relate to establishing factual guilt:

> The point of [the guilty plea] cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent [*sic*] with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.[21]

There are several problems with the *Menna* footnote. The most serious objection, which I shall discuss in greater detail later,[22] is that there is no constitutional justification for such a rule. The more immediate problem, however, is that the *Menna* footnote is inconsistent with the Court's own cases. In *Tollett*, for example, the defendant was asserting a claim that was independent of his factual guilt: the right of the accused to be charged by a process that is free from racial discrimination is a right that exists without regard to whether the defendant himself is guilty; even if he is guilty, he can challenge his conviction on the ground that other defendants who are similarly situated except for their racial background are not being prosecuted. Thus, by the standard of *Menna*, the defendant in *Tollett* should have been permitted to assert his defense of equal protection; yet the Court there held that he had forfeited the defense by pleading guilty.[23]

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21. 423 U.S. at 62 n.2 (emphasis original). Surely the Court meant "*consistent*" rather than "*in*consistent." After all, the basic theme of the footnote is that a plea of guilty operates as a conclusive admission of factual guilt and, as such, renders moot or "irrelevant" all constitutional violations that would otherwise tend to cast doubt on the defendant's factual guilt, *i.e.*, all constitutional violations that would otherwise conflict with the valid establishment of factual guilt. Accordingly, one could say that a guilty plea renders irrelevant all constitutional violations that are "*not* logically *consistent*" with the valid establishment of factual guilt; or, alternatively, one could say that a guilty plea renders irrelevant all constitutional violations that are "logically *inconsistent*" with factual guilt; but it is a simple non sequitur to say that a guilty plea renders irrelevant those violations that are "*not* logically *inconsistent*" with factual guilt. Consequently, one must assume that the Court stumbled over its use of multiple negatives and actually meant the opposite of what it said.

22. *See* notes 37-44 *infra* and accompanying text.

23. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (despite the fact that a Chinese defendant is conceded to be factually guilty of operating a laundry in

Conversely, the defendant in *Menna* was asserting a defense that was related to the determination of factual guilt, for the defense of double jeopardy is designed in part to protect innocent defendants from being wrongly convicted by means of successive prosecutions for the same offense.[24] Hence, by the rationale of the *Menna* footnote, the defendant there should not have been permitted to assert the defense of double jeopardy; yet the Court held that he had a right to assert the defense despite his plea of guilty. By the same token, the speedy-trial defense is also related to the determination of factual guilt, because it is designed in part to protect innocent defendants from being wrongly convicted due to the difficulty of preparing a defense long after a crime has occurred.[25] Hence, by the rationale of *Menna*, a defendant should be able to forfeit that defense; yet the right to a speedy trial, like that based on the prohibition against double jeopardy, is one of those defenses that is deemed to survive a guilty plea.[26]

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a wooden building without a permit, he may challenge his conviction on the ground that non-Chinese launderers similarly situated are not being similarly prosecuted). This principle of discriminatory prosecution, which operates without reference to factual guilt, should also apply to facially discriminatory indictments. *See generally* Alschuler, *supra* note 2, at 29-30. By the same token, according to *Menna*, a defendant who is factually guilty should be permitted to challenge his conviction on the ground that evidence to be used against him had been illegally seized in violation of the fourth amendment, because the exclusionary rule operates without reference to factual guilt; and yet the Court has held that the fourth amendment is *not* a defense that necessarily survives a guilty plea. *See* Lefkowitz v. Newsome, 420 U.S. 283, 288-89 (1975) (dictum). *See also* 420 U.S. at 296 n.3 (White, J., dissenting).

24. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby . . . enhancing the possibility that even though *innocent* he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957) (emphasis added).

To be sure, the defendant in *Menna* was retried following a conviction rather than following an acquittal. But with respect to the protection of innocent defendants, the double jeopardy analysis is much the same in each case. The prohibition on retrial following conviction is designed to protect defendants against double punishment. *See* North Carolina v. Pearce, 395 U.S. 711, 717-19 (1969). The prohibition provides that, having once been convicted and properly sentenced for a crime, a defendant cannot be subjected to additional or further punishment against his will; it assumes that the defendant's criminal responsibility has been fully accounted for in the first proceeding and that he is, therefore, immune from any further claim of responsibility by the state. Thus, just as the ban on retrial following acquittal is designed to protect defendants who may be innocent, so, too, the ban on retrial following conviction is designed to protect defendants who—with respect to further trial and punishment—are presumed to be innocent.

25. *See* Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

26. *Cf.* United States v. DeCosta, 435 F.2d 630, 632 (1st Cir. 1970) (dictum); New York *ex rel.* Gwynn v. Fay, 215 F. Supp. 653 (S.D.N.Y. 1963), *cert. denied*, 379 U.S. 981 (1965). *But see* United States v. O'Donnell, 539 F.2d 1233 (9th Cir.), *cert. denied*, 97 S. Ct. 386 (1976).

*Menna* is also difficult to square with *Blackledge,* which distinguishes between nonforfeitable defenses that leave the state with no "power" to obtain a conviction and thus cannot be "cured," and forfeitable defenses that do leave the state with the power to obtain a conviction and thus can be cured. In contrast, *Menna* distinguishes between defenses relating to "factual guilt," which are said to be forfeitable, and defenses not relating to factual guilt, which are said to be nonforfeitable. If these two sets of distinctions were in fact congruent, one would expect that all defenses relating to factual guilt would be curable, and all defenses not relating to factual guilt would be incurable. But that is not the case. There are some defenses (such as denial of a speedy trial) that relate to "factual guilt" and yet—as we shall see—cannot be "cured"; by the same token, there are defenses (such as discriminatory prosecution) that do not relate to factual guilt and yet can be "cured."[27]

In short, the footnote in *Menna* presents a paradox: if it is an attempt to explain the rule in *Blackledge,* it is unsuccessful, for it creates more confusion than clarity. On the other hand, if it is really an effort to overrule *Blackledge* and substitute a different rule, the footnote not only contradicts the text of the Court's opinion (which reaffirms *Blackledge*), but, as we shall see, would create a constitutional rule that defies explanation. This paradox can only be resolved by assuming that, in disposing of *Menna* summarily, the Court did not give the footnote the attention it deserved and that, on further reflection, the Court will reject or ignore it.[28]

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27. *See* notes 23 & 26 *supra*; note 39 *infra*; text at notes 77-78 *infra.*

28. Perhaps the footnote in *Menna* can be redeemed if it is understood to be merely an awkward attempt to restate the rule in *Blackledge. See* note 49 *infra.*

On the other hand, if the Court does eventually repudiate the *Menna* footnote (or explain it away), it will not be the first time the Court has been embarrassed by a casual footnote concerning forfeiture. In Ellis v. Dyson, 421 U.S. 426 (1975), for example, dissenting Justices Powell and Stewart expressed the view that defendants who plead guilty to a crime have no right under *Blackledge* to challenge their convictions on the ground that the statute defining the crime is unconstitutional:

> Nor is this case like *Blackledge v. Perry.* In that case the Court stated that the due process right at issue . . . was "the right not to be haled into court at all . . . ," so that "[t]he very initiation of the proceedings . . . operated to deny [petitioner] due process of law." . . . In this case, however, petitioners' claim is that the ordinance under which they had been charged is unconstitutional. The alleged constitutional infirmity thus lies not in the "initiation of the proceedings" but in the eventual imposition of punishment that, assertedly, the State cannot constitutionally exact.

421 U.S. at 441-42 n.7 (Powell, J., dissenting) (citations omitted). The question of forfeiture, however, had not even been raised by the parties in *Ellis.* Even if the question had been properly presented, the dissenting footnote resolved it in a manner that is inconsistent with the universal interpretation of *Blackledge* by the lower federal courts, and with the controlling distinction in *Blackledge* between "curable" and "incurable" errors. *See* text at notes 44-49 *infra.* More important, the

Thus far none of the three rules we have formulated is successful in explaining the difference between forfeitable and nonforfeitable rights. But one possibility remains: a defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."

This formulation of the rule is consistent with both *Tollett* and *Blackledge*. Although the grand jury defect in *Tollett* was the kind of error that would ordinarily preclude the state from obtaining a valid conviction so long as the error remained uncorrected, it nonetheless could be "cured": the state could have cured the error by reconstituting the grand jury and obtaining a proper indictment; if it had done so, nothing would have barred a valid conviction. Likewise, the constitutional defects at issue in the *Brady* trilogy could have been cured.[29] In *Blackledge*, on the other hand, the due process claim—like the claim of double jeopardy in *Menna*—was based on an error that could not be cured; no matter how the state might try to reconstitute its evidence or reinitiate the charges, it had no "power" to try the defendant for the felony over his objection. The constitutional defense, once asserted, would stand as an impassable and insurmountable hurdle between the state and its objective of obtaining a valid conviction. In a word, it was a "complete" defense.

### B. *Forfeiture by Plea of Guilty: The Rationale*

Now that we have identified the distinction between forfeitable

*Ellis* footnote is flatly inconsistent with Haynes v. United States, 390 U.S. 85, 87 n.2 (1968), in which the Court held that a constitutional claim going to the validity of the underlying offense itself *does* survive a guilty plea. Finally, there does not appear to be any justification for the distinction the dissenters would draw between errors relating to the "initiation" of proceedings and errors relating to "punishment." Hence one must conclude that the dissenting footnote in *Ellis*, like the footnote in *Menna*, is simply misconceived and will eventually be repudiated. *See* Alschuler, *supra* note 2, at 17-21.

29. The defect in *Brady* could have been cured by redrafting the statute to permit both the judge and the jury to impose the death penalty, or by construing the statute to prohibit both the judge and the jury from imposing the death penalty. The defect in *McMann* could have been cured by requiring the trial judge to review the validity of the confession before allowing it to be considered by the trial jury. The first defect in *Parker* was identical to the defect in *Brady*; the second defect, relating to the admissibility of the defendant's confession, could have been cured by excluding the confession from trial. (A defense based on the third defect, that members of the defendant's race were systematically excluded from the grand jury, was found not to be properly before the Court). Thus none of the defects in the *Brady* trilogy necessarily precluded the prosecution from ever obtaining a valid conviction at trial.

and nonforfeitable rights, we can try to discern a rationale for the distinction. For although we now know *how* the rule in *Blackledge* works, we have to understand *why*: why does a guilty plea operate as a forfeiture of all constitutional rights except those that are incapable of being cured? Are incurable errors somehow more fundamental than curable errors or in some way more important to the defendant? If so, is the difference sufficient to support a constitutional distinction between forfeiture and nonforfeiture?

To begin, perhaps the rule is designed to identify those cases in which the constitutional defense can be truly said to have had a material effect on the defendant's decision to plead guilty. After all, so the argument goes, we do not want to upset convictions whenever a defendant can point to some antecedent constitutional error, because defendants often plead guilty for reasons that are unrelated to constitutional defects in the state's case against them.[30] Accordingly, once the state has obtained a conviction through a plea of guilty, we should not reopen the matter and require the state to assume the difficult burden of proving its case at trial, unless we can be certain that the defendant would not have pleaded guilty had he known about the error. Thus, because of the difficulty of determining a defendant's state of mind and because of the state's interest in finality, we may be justified in assuming that only the most serious errors, *i.e.*, errors supporting "complete defenses," would have a material effect on his decision to plead guilty.

In other words, the *Blackledge* rule might be designed to separate cases in which the constitutional defect can always be presumed to be material from cases in which the defect may not have had any effect on the defendant's decision to plead guilty. Defendants who are aware of "curable" defects in the state's case against them may often decide to plead guilty anyway because of a realization that the defects can be remedied. But no defendant who is aware of an "incurable" error in the state's case against him (and who wishes to resist prosecution) would ever choose to plead guilty anyway, because he would realize that in choosing to stand trial he could never be legally convicted.

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30. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine"; because "he also knows that other admissible evidence will establish his guilt overwhelmingly"; because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty.

United States *ex rel.* Richardson v. McMann, 408 F.2d 48, 53 (2d Cir. 1969), *vacated*, 397 U.S. 759 (1970) (citations omitted).

This rationale is unsatisfactory, however, because it logically extends beyond cases of incurable errors to cases of curable errors as well. Let us assume, for example, that a defendant pleads guilty without realizing that the major item of evidence against him is constitutionally inadmissible, and that neither the item nor its fruits may be used against him at trial; assume further, that the prosecution would find it very difficult, if not impossible, to establish a case against him from independent sources. Surely this defendant could persuade a court that he would not have pleaded guilty had he known about the defect at the time of his plea. Yet it seems unlikely that the Supreme Court would permit such a defendant to challenge a guilty plea on that ground. Indeed, in a series of cases involving curable defects, the Court was willing to assume that the defendant *would not* have pleaded guilty if he had known about the defect at the time of his plea, and yet it nonetheless held that he had forfeited the claim by entering his plea of guilty.[31] These decisions suggest that *Blackledge* cannot really be designed to be a test of materiality.

Another possible explanation of the *Blackledge* rule is that it provides relief for defective guilty pleas in which the defects have not already been taken into consideration in the course of plea negotiations between the defendant and the state. After all, so the argument goes, we do not want to use a constitutional defect to overturn a conviction if the defendant has already gotten the full benefit of the defect as part of a negotiated plea. With most guilty pleas, however, it is difficult, if not impossible, to know what was implicitly taken into account in the course of negotiations. Thus, because of the difficulty of reconstructing plea negotiations and because of the state's interests of finality, it might be assumed that all but the most

31. In United States *ex rel.* Ross v. McMann, 409 F.2d 1016 (2d Cir. 1969), *vacated sub nom.* McMann v. Richardson, 397 U.S. 759 (1970), the Second Circuit held that the defendants could vacate their guilty pleas if they could show that "the plea was substantially motivated by a coerced confession the validity of which [the defendants were] unable, for all practical purposes, to contest." 409 F.2d at 1023. In vacating the judgment of the court of appeals, the Supreme Court in *McMann* implicitly rejected that standard. 397 U.S. at 766. *See also* 397 U.S. at 783 n.6 (Brennan, J., dissenting). Similarly, in Parker v. North Carolina, 397 U.S. 790 (1970), the Court, although it assumed that the defendant's confession played a part in his decision to plead guilty, precluded him from attacking his conviction on that ground. 397 U.S. at 796-97. *Cf.* 397 U.S. at 812-13 (Brennan, J., dissenting) (arguing that the conviction was invalid if unconstitutional capital punishment scheme motivated the guilty plea). Finally, in Brady v. United States, 397 U.S. 742 (1970), the Court assumed *arguendo* that the defendant would not have pleaded guilty but for the defect in the capital punishment statute, and yet it precluded him from attacking his conviction on that ground. 397 U.S. at 750.

complete defenses are always taken into account in a defendant's decision to plead guilty.

In other words, *Blackledge* may be designed to separate negotiated from nonnegotiated defenses. The argument would proceed as follows: curable defenses are the natural subject for plea negotiations because, by their very nature, they carry no certain assurance that their assertion will prevent the state from obtaining a valid conviction at trial; yet, as a matter of proof, it is always difficult to determine whether a defendant who pleads guilty has taken his defenses into account in entering his plea. Consequently, as a rule of practice, it is fair to assume that wherever a defendant pleads guilty in the face of a curable error, he must have explicitly or implicitly accounted for the error. Conversely, incurable defenses are not an appropriate subject for plea negotiations because, by their nature, they operate as complete defenses: no defendant (who wishes to contest prosecution) would ever use a complete defense as a bargaining chip to obtain a mere reduction in charge or sentence when he could use it to bar conviction and sentence altogether. Consequently, it is fair to assume that whenever a defendant pleads guilty in the face of an incurable error, he could not have been aware of the error or have used the error as a bargaining chip in his plea negotiations and, therefore, now deserves an opportunity to assert it in his defense.

There are several problems with this explanation of *Blackledge*. To begin with, if the purpose of the rule is to distinguish cases on whether or not there has been bargaining over the constitutional defenses, the rule is not very useful, because we cannot assume that a defendant never bargains over incurable defects. To be sure, if a defendant is confident that he has a complete defense, he is hardly likely to use the defense as a negotiating device to obtain only a reduction in sentence or charge. But a defendant will often be unsure about the validity of his defense and may prefer to use his ostensibly complete defense as a bargaining chip to obtain partial relief in sentence or charge through negotiation, rather than press for a final ruling one way or the other.[32]

Furthermore, if it were really the Court's purpose in *Blackledge* to distinguish cases on whether or not there has been negotiation on the constitutional error, the Court would have to allow a defendant to assert such defenses whenever he could actually prove that he did

32. *See* Blackledge v. Perry, 417 U.S. 21, 37 (1974) (Rehnquist, J., dissenting). *See also* text at notes 80-81 *infra*.

not negotiate at all, or that the negotiations did not take account of the alleged error. Yet the Court is unwilling to do so. In *Tollett*, for example, the record showed that neither the defendant nor the prosecutor considered the grand jury defect in their negotiations, for both were simply unaware of it; yet the Court barred the defendant from relying on the defect to challenge his plea.[33]

Another conceivable rationale is that *Blackledge* identifies for relief those cases in which the state simply has *no interest* in preserving a criminal conviction. Suppose, for example, that a defendant pleads guilty to the crime of miscegenation, that the anti-miscegenation statute is later declared unconstitutional as a denial of equal protection, and that the decision is made retroactive. Obviously, the defendant, despite his guilty plea, would have a right to challenge his conviction under *Blackledge* because the constitutional error is incurable. Moreover, if he were asked to explain why he should be allowed to challenge his conviction, he might well say that his defense demonstrates that the state has "no interest" in preserving the effects of his conviction because, by declaring the miscegenation statute unconstitutional, a court has held that the state has no interest in making racial intermarriage a crime.[34]

One may ask, however, whether it is sensible to conclude that a state has "no interest" in punishing conduct that its legislature has explicitly determined to be criminal and that its executive officers have specifically resolved to prosecute.[35] Furthermore,

33. 411 U.S. at 267. The United States court of appeals had affirmed the granting of a writ of habeas corpus to the defendant because he "neither knew nor could have known of the [grand jury] right at the time he entered his plea." Henderson v. Tollett, 459 F.2d 237, 242 n.5 (6th Cir. 1972), *revd.*, 411 U.S. 258 (1973). Similarly, the district court had made the finding that defendant's original counsel had not objected to the indictment "quite simply, because the possibility never occurred to him." 342 F. Supp. 113, 115 (M.D. Tenn. 1971). At an earlier stage of the litigation, one judge concluded that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948." State *ex rel.* Henderson v. Russell, 459 S.W.2d 176, 179 (Tenn. Crim. App. 1970) (Galbreath, J., concurring).

34. This rationale is advanced in Note, *supra* note 4, at 1447 (a defendant who had pleaded guilty should be permitted to attack his conviction on the ground that the statute defining his crime is unconstitutional, "[b]ecause there is no legitimate governmental interest served by securing [such] convictions"). *See* United States v. Broadus, 450 F.2d 639, 641 (D.C. Cir. 1971); United States v. Liguori, 430 F.2d 842, 849 (2d Cir. 1970), *cert. denied*, 402 U.S. 948 (1971).

35. To be sure, one can say that the fact that a statute is held unconstitutional shows that the state now has "no interest" in prosecuting under it. But that begs the question: the fact that a statute is declared unconstitutional does not mean the state has "no interest" in enforcing the statute; it merely means that the state's interests are overridden by the defendant's constitutional interests. *See* note 36 *infra*.

For example, there is nothing irrational about anti-miscegenation statutes: such statutes existed until recently in most states of the Union, and presumably would still

even if the rationale explains cases in which the accused is arguing that his conduct cannot constitutionally be made a crime, it does not explain all cases in which the accused has a complete defense to conviction. In *Blackledge* itself, for example, the defendant did not go so far as to contend that the state had no interest in prosecuting him for the felony of assault with intent to kill; instead, he argued that the state should have charged him with the felony initially, and not as a response to his decision to take a de novo appeal from his misdemeanor conviction. Similar reasoning applies with regard to other defenses, such as those of double jeopardy, speedy trial, and presidential pardon. In each case, although the defense would bar the possibility of conviction, it does nothing to abrogate the state's interest in prosecution. Thus, far from being cases in which the state has no interest in prosecution, these are cases in which the state's interest is merely outweighed by interests of the accused.[36]

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exist in some states today if the Supreme Court had not declared them unconstitutional. Moreover, it took the Court thirteen years following *Brown v. Board of Education* to summon up the courage to declare such statutes invalid. The Court did have a chance in 1955 to invalidate such statutes on equal protection grounds, but it apparently felt that the country was not yet ready for that step. *See* Naim v. Naim, 350 U.S. 891 (1955), 350 U.S. 985 (1956); Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1224 (1975). By refusing to consider the validity of such statutes in 1955, the Court implicitly recognized that the states had a *perceived* interest in making interracial marriage a crime—a perceived interest perhaps as strong as the states' interest in maintaining racially segregated public schools. Indeed, it has been suggested that it was the states' interest in preventing miscegenation that ultimately explained their resistance to racially integrated public schools. *See* R. KLUGER, SIMPLE JUSTICE 158, 195, 266, 672, 751 (1976). Although the Court eventually invalidated the miscegenation statutes in Loving v. Virginia, 388 U.S. 1 (1967), *Loving* is itself graphic evidence that as late as 1967 the State of Virginia considered its interest in prohibiting miscegenation to be sufficiently strong to justify criminal prosecution.

36. By saying the state has "no interest" in preserving a conviction, one may mean that no rational purpose is served by the conviction. However, the statement is certainly false with respect to convictions barred by double jeopardy and probably false even for convictions based on unconstitutional statutes (*see* note 35 *supra*): convictions do serve a rational purpose in those cases; otherwise, presumably, the state would not be defending them. On the other hand, by saying the state has "no interest" in preserving a conviction, one may mean that its interests in conviction are nullified by constitutional concerns. But, that would then be true with respect to *every* constitutional defense to conviction, including the grand jury defense in *Tollett*, *see* text at note 23 *supra*, and the defenses at issue in the *Brady* trilogy, *see* note 29 *supra*. The rationale in these cases has to be that conviction is prohibited by the Constitution not because the state has no interest in preserving the convictions, but because the state's interests are outweighed by the defendant's interests.

To be sure, in weighing the state's interest in conviction against the defendant's interest in asserting his constitutional defenses, one may be justified in drawing a distinction between "curable" and "incurable" defenses for purposes of deciding whether to permit a defendant to set aside a guilty plea. Indeed, it is precisely the purpose of this article to justify such a distinction. Once this distinction has been justified, some readers may find it useful to describe the cases in which collat-

Yet another possible rationale is the one advanced in a footnote in *Menna*: a plea of guilty is a confession of "factual guilt"; once a defendant has confessed that the alleged facts against him are true, there is no need to be concerned with defenses relating to the establishment of factual guilt.[37] Under this analysis, the guilty plea renders "irrelevant" those defenses designed to protect a factually innocent defendant from wrongful conviction—*i.e.*, defenses relating to the integrity of the factfinder, the admission of evidence, and the burden of proof. On the other hand, because a guilty plea is nothing more than an admission of factual guilt, it does not (and constitutionally cannot) have any effect on defenses that operate without regard to whether the alleged facts against the defendant are true. This view was expressed by Justice White in another context:

> [F]ederal constitutional principles simply preclude the setting aside of a state conviction by a federal court where the defendant's guilt has been conclusively established by a voluntary and intelligent plea of guilty. Labels aside, a guilty plea for federal purposes is a judicial admission of guilt conclusively establishing a defendant's factual guilt.[38]

There are several problems with this rationale. First, as already indicated, it does not succeed in explaining the rule in *Blackledge*, because there is no necessary correspondence between defenses that can be "cured" and defenses relating to "factual guilt," or between complete defenses and defenses relating to "legal guilt."[39] Accordingly, even if *Menna* could stand on its own as an independent rule of forfeiture, it cannot be understood as an explanation of the rule in *Blackledge*.

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eral attack is permitted as cases in which the state has "no interest" in conviction. But this "no interest" label is useful only *after* one has identified the justification for treating "incurable" defenses differently from others; it is of no use in trying to discover what that justification is. The same thing is true of the "jurisdictional" label: once we have explained why a certain category of defenses survives a plea of guilty, we may find it useful to describe the category as "jurisdictional" defenses. *See* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 572 (1977). But calling a defense "jurisdictional" is a conclusion, not an explanation: it does nothing to explain why the defense should be deemed to survive a guilty plea.

37. 423 U.S. at 62-63 n.2.

38. Lefkowitz v. Newsome, 420 U.S. 283, 299 (1975) (White, J., dissenting). *See also* Henderson v. Morgan, 426 U.S. 637, 648 (1976) (White, J., concurring).

39. For example, the defense of discriminatory prosecution operates without regard to whether the defendant is factually guilty of the crime charged, *see* note 23 *supra*. Accordingly, as a defense relating to "legal guilt" within the meaning of *Menna*, it should be treated as a defense that cannot be forfeited by a plea of guilty; and yet it is also a defense that is capable of being "cured" within the meaning of *Blackledge* (and therefore forfeitable), because the case can also be reinstated as part of a program of nondiscriminatory prosecution. Conversely, the "speedy

Secondly, even if the *Menna* footnote was intended to be understood as creating a new rule independent of *Blackledge*, it must fail because there is no apparent constitutional justification for the new rule. Until now, of course, we have assumed that the *Menna* footnote was merely an attempt to restate and illuminate the rule in *Blackledge*, and we have seen that it fails in that respect. But what if *Menna* was intended as a new rule of forfeiture independent of *Blackledge*? Or what if the Court in *Menna* intended to overrule *Blackledge* and replace it with a new rule? In that event, if *Menna* is to stand by itself, we must ask whether there is any constitutional justification for a rule of forfeiture that distinguishes between defenses relating to "factual guilt" (which are forfeitable) and defenses relating to "legal guilt" (which are not forfeitable).

Unfortunately, *Menna* cannot stand on its own as an independent rule of forfeiture. For one thing, the Court in *Menna* failed to explain the source of its authority to treat the guilty plea there as an admission of "factual" rather than "legal" guilt. After all, *Menna* was a state case involving the effect of a guilty plea in state court; it is up to New York to define the preclusive effect of guilty pleas in its courts, and, indeed, the New York courts in *Menna* had already determined that under state law a guilty plea operated as a forfeiture of *all* defenses, including the defense of double jeopardy. Consequently, if the Court in *Menna* is understood as deciding that a plea of guilty is nothing more than an admission of "factual guilt" under the laws of New York, one must question the source of its jurisdiction to make that judgment in opposition to the opinion of the highest court in the state.

Furthermore, even if *Menna* had been a federal case or even if the Court had jurisdiction to define the preclusive effect of the guilty plea under domestic law, the Court failed to explain *why* a guilty plea should be understood to be a conclusive admission of "factual guilt." The Court could hardly have been making an empirical judgment, because experience suggests that defendants usually plead guilty not because they wish to confess the truth of the facts alleged against them, but because they recognize the state will probably succeed in establishing those facts at trial.[40] Empirically,

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trial" defense operates in large part to protect defendants who are factually innocent of the crime charged (*see* note 25 *supra*); accordingly, it is a forfeitable *Menna* defense because it relates to "factual" guilt; and yet it is also a nonforfeitable *Blackledge* defense, incapable of being "cured," because the only remedy for the violation is a dismissal with prejudice.

40. *See generally* Nagel & Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models: Parts I & II*, 51 IND. L.J. 987 (1976), 52 IND. L.J. 1 (1977). *See*

a guilty plea is usually nothing more than a prediction about probability of conviction at trial; as a measure of factual guilt, then, it is usually no more reliable than the defendant's *prediction* of the outcome of trial, and, in any event, it is certainly not conclusive proof of factual guilt.[41] Consequently, in concluding that a guilty plea is conclusive proof of factual guilt, the Court could scarcely have been making an empirical statement.

This brings us to the real issue in *Menna*. We must assume that the Court did not decide that a guilty plea is nothing but an admission of factual guilt under state law, because it had no jurisdiction to do so; nor did it decide that a guilty plea is an admission of factual guilt as an empirical matter, because that is simply not true. Rather, in deciding that the guilty plea in *Menna* operated as a forfeiture only of defenses relating to factual guilt, the Court made a *constitutional* judgment: it held that insofar as state law provided for the forfeiture of a defense not relating to factual guilt, *i.e.*, defenses relating to "legal" guilt, the state law of forfeiture was unconstitutional. Thus, *Menna* stands for the proposition that for purposes of forfeiture, the states have constitutional authority to treat a guilty plea *as if* it is an admission of factual guilt, but not *as if* it is an admission of legal guilt.

But the above merely restates, rather than justifies, the rule in *Menna*. The truly important questions remain to be answered. Why does the Constitution permit a state to treat a guilty plea as if it were a conclusive admission of factual guilt, contrary to our experience? Conversely, why does the Constitution forbid a state from treating a guilty plea as if it were also an admission of "legal guilt?" If these "legal" defenses can be waived (and the Court assumes they can),[42] why does the Constitution prohibit a state from treating a

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*also* Note, *supra* note 36, at 573-74; Note, *supra* note 4, at 1444 n.56. In *Brady*, Justice White assumed that at least some guilty pleas are based on the defendant's perception of the strength of the state's case against him. 397 U.S. at 756-58. In North Carolina v. Alford, 400 U.S. 25, 36-37 (1970), the Court also recognized that defendants who believe they are factually innocent may nonetheless plead guilty because of the strength of the state's case against them.

41. Indeed, the Court conceded in *Brady* that guilty pleas are no more reliable than full trials as indicators of factual guilt: "This is not to say that guilty plea convictions hold no hazards for the innocent . . . . This mode of conviction is no more foolproof than full trials to the court or to the jury." 397 U.S. at 757-58. For an analysis of the extent to which guilty pleas may be *less* reliable than trial verdicts, see Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) (indicating that many defendants who now plead guilty would be acquitted if they went to trial).

42. The "legal" defense of double jeopardy, for example, is one that can be waived. *See* Blackledge v. Perry, 417 U.S. 21, 35 (1974) (Rehnquist, J., dissenting).

guilty plea as if it were a final admission of legal guilt? Are the constitutional defenses relating to legal guilt more important than those relating to factual guilt? Is the defense of double jeopardy more important than the privilege against self-incrimination? These are the questions that must be answered if we are to assume that *Menna* is to be taken seriously as a new rule of forfeiture. If (as I suspect) there is no satisfactory answer, then we must assume that, unlike the distinction between "curable" and "incurable" defenses,[43] there is no constitutional justification for the distinction between defenses relating to "factual guilt" and defenses relating to "legal guilt."[44]

Thus far I have explored and rejected four possible rationales to explain the rule in *Blackledge*. There remains another, more satisfactory possibility: the rule in *Blackledge* might be designed to identify those cases in which to set aside a conviction based on a guilty plea places the state in no worse a position with respect to its ability to obtain a valid conviction against the defendant at trial than it occupied before entry of the plea.

The state, which has a general interest in the finality of all convictions, has a particularly great interest in the finality of convictions based on guilty pleas. If a conviction based on a trial is later set aside, the state faces the difficult task of proving again that the defendant is guilty beyond a reasonable doubt. The task is difficult because it is *never* easy to sustain such a burden of proof, and the task becomes more difficult as the time period between the alleged criminal act and trial lengthens. Yet the state at least has the advantage of having once prepared its case for trial and of having preserved much, if not all, of its evidence in a form that is admissible at trial. On the other hand, if a guilty plea is later set aside, the state is in a much worse position vis-à-vis the defendant with respect to its ability to prove him guilty beyond a reasonable doubt. The state typically does not prepare cases terminating in a guilty plea as thoroughly as those destined for trial. Even if it prepares a guilty plea case as thoroughly, it does not preserve the case in a form that is readily admissible against the defendant should he now choose to go to trial. As a result, if a conviction based in a guilty plea is set

*See also* authorities cited in Ballou, *"Jurisdictional" Indictments, Informations and Complaints: An Unnecessary Doctrine*, 29 ME. L. REV. 1, 16 n.112 (1977).

43. There is a defensible rationale for the distinction between curable and incurable errors. *See* text accompanying notes 44-49 *infra.*

44. Of course, *Menna* can be rationalized if it is reinterpreted to be nothing but a restatement of *Blackledge*. *See* note 49 *infra.*

aside, the state may well find itself unable to prove the defendant guilty at trial, even if it would have been able to do so had he originally pleaded innocent and gone to trial.[45]

The rule in *Blackledge* is ideally suited to further this interest in the finality of guilty pleas. It holds that a defendant is not permitted to challenge a guilty plea because of a constitutional error that is "curable" since, even where an error can be cured, the entry of the plea itself may have impaired the state's ability thereafter to prove the defendant guilty at trial. Of course, one can never know for sure whether the state would have succeeded in proving its case if the defendant had originally gone to trial rather than pleaded guilty, but it is not unfair to assume that the state relied on the plea to its detriment, particularly because the entry of the plea has itself made the issue so difficult to resolve afterward with any precision. Conversely a defendant *is* permitted to challenge a guilty plea because of a constitutional error that is incurable. In this case, the state is in precisely the same position after the entry of the guilty plea as it occupied beforehand with respect to its ability to prove the defendant guilty at trial, because the error would always have prevented it from obtaining a valid conviction at trial.[46]

To be sure, the state obviously loses something when a guilty plea is set aside: it loses the benefit of a conviction against a defendant who has confessed judgment. But if the state's interest in preserving such convictions were alone sufficient to justify the forfeiture of antecedent errors, it would justify the forfeiture of *all*

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45. Both the majority and dissenters in *McMann* admitted that the controlling factor in the decision was the state's interest in the finality of convictions based on guilty pleas: "What is at stake in this phase of the case is . . . whether, years later, defendants must be permitted to withdraw their [guilty] pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and *putting the state to its proof.*" 397 U.S. at 773 (emphasis added). *Cf.* 397 U.S. at 786 (Brennan, J., dissenting) ("what is essentially involved both in the instant case and in *Brady* and *Parker* is nothing less than the determination of the Court to preserve the sanctity of virtually all judgments obtained by means of guilty pleas"). *See also* Blackledge v. Allison, 97 S. Ct. 1621, 1628 (1977) (the state has an interest in according guilty pleas "a great measure of finality"). Reasonable people may differ, of course, on whether the state's interest in the finality of guilty pleas should outweigh the defendant's interest in asserting his constitutional defenses. *Cf.* Davis v. United States, 411 U.S. 233, 252-53 (1973) (Marshall, J., dissenting) (questioning whether the state's interest in finality justifies "a strict system of forfeitures"). This, however, is the essential issue to be resolved in these cases, not whether the defendant made a decision to "waive" his rights. *See* note 4 *supra* and accompanying text.

46. Vacating the plea [because of a "complete" constitutional defense] does not present the United States with the arduous task of attempting, years after the trial would originally have taken place, to piece together a case for the prosecution.

United States v. Sams, 521 F.2d 421, 426 (3d Cir. 1975) (footnote omitted).

errors, both curable and incurable. Consequently, if the distinction in *Blackledge* between curable and incurable errors is sound, it must be because the state has no interest—or, at least, no sufficient interest—in preserving a conviction simply because the defendant once made a deliberate decision to forgo constitutional opportunities to contest the state's case. It must mean that the state's *mere expectation* in the finality of the conviction is insufficient, by itself, to override the defendant's interest in asserting constitutional defenses.[47]

Rather, in order to preserve a conviction in the face of constitutional challenge, the state must make a stronger showing of interest: it must make a showing of actual prejudice. It must be able to claim that by pleading guilty, the defendant caused the state to change its position to its actual disadvantage; in effect, it must be able to claim that it relied to its detriment on the finality of the defendant's plea. Thus, when a guilty plea is challenged on the basis of a curable error, the state can almost always allege in good faith that it relied on the finality of the conviction and, in doing so, lost valuable opportunities to gather and present a successful case against the defendant at trial.[48] With respect to incurable errors, on the other hand, the state can never honestly allege that it relied to its detriment on the defendant's plea, because an incurable error invalidates the state's case from the outset: when a state's litigating position is hopeless from the beginning, there is nothing a plea of guilty can do to worsen it.

In short, the rule in *Blackledge* is designed not to preserve convictions, but to preserve the state's *opportunity to obtain* valid convictions at trial. This ultimately explains the difference in the finality of guilty pleas depending on whether they are challenged for curable or incurable errors. Moreover, this may also explain what the Court was trying to say in *Menna* when it distinguished between "factual" and "legal" guilt. Thus far we have assumed that by "factual" guilt the Court in *Menna* intended to refer to *actual* guilt; indeed, in all likelihood, that is probably what the Court did intend. But it is also possible that by referring to a guilty plea as an admission of "factual" guilt, the Court meant that a guilty plea is merely an admission by

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47. *See* Dukes v. Warden, 406 U.S. 250, 266 (1972) (Marshall, J., dissenting) (the state's "claim [of] disappointed expectations" in the finality of a conviction is not sufficient to preclude a defendant from asserting constitutional defenses, absent an additional showing of "specific and substantial harm").

48. An exception to this rule of forfeiture may be justified if the defendant can actually show that the state did not rely to its detriment on the plea. *See* Dukes v. Warden, 406 U.S. 250, 257 (1972) (Stewart, J., concurring); 406 U.S. at 264-71 (Marshall, J., dissenting); Santobello v. New York, 404 U.S. 257, 267-68 (1971) (Marshall, J., dissenting). *See also* note 69 *infra*.

the defendant that if the case had gone to trial, the state could have successfully proved the "facts" alleged against him. If that is what the Court intended (and that conclusion is not inconceivable), then *Menna* can be accepted as a crude restatement of the *Blackledge* rationale.[49]

If this analysis of *Blackledge* is correct, it leads us to some general conclusions about the nature of forfeiture. First, the forfeiture of constitutional defenses is justified not by the deliberate and voluntary consent of the defendant (as is said to be true of waiver), but by the overriding interests of the state. Secondly, constitutional defenses in criminal procedure, like other constitutional rights, are defined by a balance between the interest of the individual and the interest of the state: in this case, we balance the interest of the defendant in asserting the values protected by the particular constitutional defense at issue against the interest of the state in preserving its opportunity to obtain a conviction at trial. The magnitude of the defendant's respective interest is the same in each case, but the state's interests differ depending on the nature of the defense. In the case of curable defenses, the state is prejudiced when a guilty plea is set aside, because entry of the plea may be assumed to have placed the state at a disadvantage with respect to its ability to obtain a conviction against the defendant at trial. On the other hand, in the case of an incurable defense, the state is not prejudiced by the entry of the guilty plea, because it would never have been able to obtain a conviction at trial. Thus, the difference between forfeitable and non-

49. Thus far we have understood *Menna* to say that a guilty plea is a conclusive admission of "factual guilt" and, as such, operates as a forfeiture of all defenses relating to the claim that the defendant is factually innocent of the crime charged. Unfortunately, as we have seen, this construction of *Menna* is both inconsistent with the Court's prior cases and insupportable as a matter of policy. *See* notes 23-28 & 37-44 *supra* and accompanying text. Without doing too much violence to the language of the footnote, however, we can restate *Menna* in a manner that is consistent with *Blackledge*: when a defendant pleads guilty, he agrees to forgo the right to go to trial; he thus forgoes the right to demand that the state prove its case against him and relieves the state of the burden of engaging in the factfinding process at trial; as a result, he forfeits defenses that, if valid, would put the state to the test of going to trial to prove the *facts* alleged against him. Thus, in the language of *Menna*, a guilty plea is an admission of "factual guilt" *in the sense that it is an admission that the government could have proved the facts alleged against him if it had gone to trial.* To be sure, by this analysis of *Menna*, a guilty plea is not an admission that the defendant is *actually guilty* of the facts alleged against him; if it were, then he would forfeit not only defenses related to the state's evidence at trial, but also the defenses of double jeopardy and speedy trial, which are designed to protect defendants who are factually innocent. Rather, by this analysis, a guilty plea is an admission of "factual" guilt only to the extent that it admits that the state would have succeeded in proving its factual case at trial. Thus the defendant may still assert those defenses which, if valid, would always preclude the state from obtaining a valid conviction even if it were entirely successful at trial.

forfeitable rights in the context of the guilty plea is the difference between rights that are outweighed by a conflicting state interest and rights that are not in conflict with a controlling state interest.[50]

In sum, the analysis of forfeiture in criminal procedure is no different from the analysis of constitutional rights in other contexts: it requires one to identify the nature of the defendant's interests, to identify the nature and magnitude of the state's interest, and to strike a balance between the two in light of alternatives for achieving their respective goals.

## II. THE FORFEITURE OF DEFENSES BY RULES OF TIMING: AN EXAMINATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 12

A criminal defendant can forfeit his constitutional defenses in ways other than by pleading guilty, most commonly by failing to comply with rules requiring that pretrial defenses be asserted in a timely fashion. Many courts have ruled that a criminal defendant must raise his grand jury objections before trial or forgo the opportunity to raise them at all. The Supreme Court, in turn, has upheld the forfeiture of constitutional defenses because of the defendant's failure to comply with such rules, despite the fact that the defendant's failure to assert his defenses in timely fashion did not represent an informed or deliberate decision to forgo them.

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50. This rationale for forfeiture in the context of the guilty plea finds support in decisions in other areas of criminal procedure. In Illinois v. Allen, 397 U.S. 337 (1970), for example, the defendant was held to have lost his constitutional right to be present at his trial because of his misconduct in the courtroom. As Michael Tigar points out, however, it is difficult to square the decision with traditional notions of waiver, because the defendant in *Allen* insisted throughout the proceedings that he wanted to remain in the courtroom. Tigar, *supra* note 1, at 11. Rather, the real justification for the decision is that the defendant "forfeited" his right to be present by his misconduct: that is, even though the defendant continued in his desire to remain in the courtroom, his constitutional right to be present was outweighed by the state's overriding interest in being able to proceed with the trial in an orderly fashion. *Cf.* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1345 (4th ed. 1974) (right to be present forfeited by failure to appear). Yale Kamisar came to this same conclusion more than five years ago in an unpublished memorandum to the Uniform Commissioners on State Laws:

> [I]t now seems clear to [me] that we should not be dealing with "waiver" of constitutional rights but rather with the question: Under what circumstances does defendant's *misconduct* work a *forfeiture* of his right to be personally present? The defendant who voluntarily absents himself from his trial after it has commenced or who engages in intolerably disruptive and offensive conduct during the trial does not really "agree" to be tried in his absence or "intentionally relinquish" his right to be present. Rather he loses or forfeits his right to be personally present by way of penalty for violating certain obligations or conditions.

Y. Kamisar, Memorandum on Uniform Rules of Criminal Procedure 5-6 (April 1972) (unpublished manuscript on file with the *Michigan Law Review*) (emphasis original).

In *Davis v. United States,*[51] for example, the defendant was tried and convicted in federal court without having challenged the composition of the grand jury that indicted him. Three years later, he petitioned for relief from his conviction, arguing that the indicting grand jury had been unconstitutionally impaneled; in support of his claim, he asserted that his failure to raise the defense before trial was inadvertent and not the kind of deliberate act associated with traditional concepts of waiver. The Court did not dispute the defendant's allegations concerning waiver; nor did it find that he had decided to relinquish his grand jury defense. Nonetheless, it held that he had forfeited his right to raise the grand jury objection by failing to comply with Federal Rule of Criminal Procedure 12(b)(2), which requires that such a defense be raised, if at all, before trial:

> We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived [forfeited] pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which that Rule requires. We therefore hold that the waiver [forfeiture] standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.[52]

The Court subsequently reached the same conclusion in a case involving a state-court defendant's failure to comply with a comparable state rule of procedure governing the timeliness of grand jury objections.[53]

The operation of rule 12 provides a good test of whether the constitutional standards applicable to forfeiture by guilty plea are relevant in other contexts. The rule divides all defenses into three categories: (1) defenses that must be raised before trial or be forfeited; (2) defenses that must be raised by the end of trial or be forfeited; and (3) defenses that may be raised at any time during the pendency of the proceedings. I shall examine these three classes of defenses to determine whether the applicable standards of forfeiture can be justified when examined in light of the constitutional standards that prevail in the context of guilty pleas.

### A. *Defenses That Must Be Raised Before Trial*

Rule 12 provides that a defendant must raise before trial all

51. 411 U.S. 233 (1973).
52. 411 U.S. at 242.
53. Francis v. Henderson, 425 U.S. 536 (1976).

defenses that are "capable of determination without trial of the general issue" and that fall within any of the following categories:

> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense . . .); or
>
> (3) Motions to suppress evidence; or
>
> (4) Requests for discovery under Rule 16; or
>
> (5) Requests for a severance of charges or defendants under Rule 14.[54]

Categories (3) through (5) are self-explanatory. Categories (1) and (2) are understood to include defenses concerning selection and composition of the grand jury, the procedures of the grand jury, jurisdiction over the person of the defendant, selection of the petty jury, and the form of the indictment or information including claims that the charging paper is duplicitous or multiplicitous.[55] All five categories of defenses are relevant to the present inquiry because each can contain defenses that are *constitutional* in origin. It is also important to observe that these rule 12(b) defenses are all "curable" within the meaning of *Blackledge*: if raised and corrected before trial, each would leave the way open to the state to obtain a valid conviction at trial.

Having enumerated these defenses, rule 12 further provides that the defendant's failure to raise them before trial "shall constitute waiver thereof, but that the court for cause shown may grant relief from the waiver."[56] By now it should be clear that what the rule calls "waiver" is not waiver in the traditional sense, since it is not a deliberate, informed decision by the defendant to relinquish a defense in his favor. The defendant in *Davis* did not *choose* to forgo his grand jury objection; in fact, he was completely unaware of it at the time he went to trial.[57] And yet, by failing to raise the de-

54. FED. R. CRIM. P. 12(b). The current rule, as amended in 1975, is slightly different from the terms of the rule as it existed at the time of Davis v. United States, 411 U.S. 233 (1973). For the terms of the rule as it then existed, see 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 394 (1969).

55. *See* 1 C. WRIGHT, *supra* note 54, § 193, at 406-09.

56. FED. R. CRIM. P. 12(f).

57. A similar case in this regard is McMann v. Richardson, 397 U.S. 759 (1970), where the defendant could hardly have been expected to raise the *Jackson v. Denno* defense at the time he pleaded guilty, *see* Jackson v. Denno, 378 U.S. 368 (1964) (due process right to determination that confession was validly given), because that case had not yet been decided. The same was true of the unconstitutional death-penalty defense in Brady v. United States, 397 U.S. 742 (1970).

fense before trial, he lost it forever, both for purposes of direct appeal and for purposes of collateral attack. Thus, when the rule speaks of "waiver," it refers to what we would call "forfeiture"—the loss of constitutional rights by operation of law, without regard to the state of mind or intention of the defendant.

It should also be clear that the rule of forfeiture under rule 12 is different from the rule for guilty pleas. Forfeiture by a guilty plea is justified by the state's interest in preserving convictions in every case in which the state might have obtained a conviction following trial if the case had not terminated in a guilty plea. As a result, by pleading guilty, a defendant forfeits all defenses except those that would have precluded the state from ever obtaining a conviction against him at trial; moreover, he forfeits those curable defenses whether or not he was ever realistically in a position to assert them.

In light of *Davis*, forfeiture under rule 12 is more limited than forfeiture by guilty plea. The main difference is that a defendant does not forfeit defenses under *Davis* unless he was realistically in a position to assert them before trial. Thus, the defendant in *Davis* would not have forfeited his grand jury defense if he could have shown *cause* for not having raised the defense before trial. In other words, in striking a balance between the defendant's interests in asserting such defenses (many of which will be constitutional in origin) and the state's interest in blocking those defenses, the rule in *Davis* cuts off only those defenses that the defendant is reasonably capable of asserting before trial.

Therefore, the pertinent question is this: why should the constitutional rule of forfeiture for pretrial defenses be more generous than the rule for guilty pleas? It might be said in response that the difference between *Tollett* and *Davis* is not between two *constitutional* rules of forfeiture—one governing guilty pleas and the other governing pretrial defenses—but between two *domestic* rules of forfeiture. That is, the Court in *Tollett* was not asked to define the domestic rule of forfeiture for guilty pleas for the State of North Carolina; instead, it was presented with a state rule that a defendant forfeits his antecedent defenses by pleading guilty, regardless of whether he had "cause" for failing to assert them before entering his plea. Given this domestic rule of forfeiture, the Court in *Tollett* merely held that the rule was not unconstitutional, at least with respect to the "curable" constitutional defense at issue there. Similarly, in *Davis* the Court was not asked to define the domestic rule of forfeiture for pretrial defenses; instead, it was presented with an existing federal rule that a defendant who stands trial does not forfeit

his antecedent defenses if he can show "cause" for failing to assert them before trial. Given that rule (which happened to be more generous than the domestic rule in *Tollett*), the Court merely held that the rule was not unconstitutional; it did *not* decide that a stricter domestic rule of forfeiture for pretrial defenses would be unconstitutional. In short, the difference between *Tollett* and *Davis* may not be a difference between what is constitutionally acceptable as the outer limit of forfeiture for guilty pleas as opposed to pretrial defenses, but merely a difference between two domestic rules of forfeiture, both of which happen to be constitutional.

There are several problems with this explanation of the relationship between *Tollett* and *Davis*. First, it fails to explain why the Court took a more expansive view of forfeiture for guilty pleas than for pretrial defenses on the one occasion in which the Court *did* play a role in defining the domestic rule of forfeiture. To be sure, the Court had no authority in *Tollett* (a state case) to define the underlying rule of forfeiture for guilty pleas; it merely passed on the validity of a prior rule of forfeiture created by state law. But in *Brady v. United States*,[58] which was a federal case, the Court did perform the common-law function of defining the domestic rule of forfeiture for guilty pleas in the federal courts. And in doing so, it adopted the broad rule that, by pleading guilty, a defendant forfeits all antecedent defenses, without regard to whether he may have had "cause" for failing to assert them before entering his plea. Thus, in fashioning a domestic rule of forfeiture for guilty pleas in federal cases, the Court implicitly recognized a distinction between convictions based on guilty pleas and convictions following trial.

Secondly, this nonconstitutional view of *Davis* is difficult to square with *Francis v. Henderson*.[59] The facts in *Francis* were similar to those in *Davis*, in that both involved defendants who had been convicted at trial and were seeking to attack their convictions collaterally because of constitutional defects in the grand juries that had indicted them. However, there were several significant differences between the two cases. For one, *Francis*, unlike *Davis*, was a state case. Accordingly, the Court had to accept the rule of forfeiture defined by state law and limit its review to determining the constitutional validity of the state rule. Furthermore, the rule for pretrial defenses in *Francis*, unlike rule 12 in *Davis*, was absolute: it required the defendant to raise his grand jury defenses before trial

58. 397 U.S. 742 (1970).
59. 425 U.S. 536 (1976).

without regard to whether he had "cause" for failing to assert them at that time. Consequently, *Francis* presented the question whether a state has the constitutional authority to adopt a rule of forfeiture for pretrial defenses as broad as the rule created in *Tollett* and *Brady* for guilty pleas.

In the end, the Court in *Francis* was able to avoid that question because it found that the defendant there had failed to show "cause" for not asserting his grand jury objection before trial. Nonetheless, the Court went on to say in dictum that, if the defendant in *Francis* had been able to show such cause, he would have a right to challenge his conviction on that ground, the state rule to the contrary notwithstanding.[60] Hence one can interpret *Francis* as standing for the proposition that a state has no constitutional authority to prohibit a defendant who has been convicted at trial from attacking his conviction on the basis of constitutional defenses that he had "cause" for not asserting before trial.[61]

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60. 425 U.S. at 542.

61. Alternatively, it might be argued that *Francis* is a purely statutory decision. By that interpretation, the exception for "cause" in *Francis* is not a constitutional requirement, but rather a new statutory standard of forfeiture implicit in the statute governing federal review of state convictions, *see* 28 U.S.C. § 2254 (1970). Thus, until recently it was assumed that criminal defendants had a federal statutory right to assert by writ of habeas corpus all constitutional defenses to their conviction except defenses they had "deliberately bypassed," *see* Fay v. Noia, 372 U.S. 391, 428-34, 438-39 (1963), and that the deliberate-bypass standard applied in all cases, including review of state convictions under § 2254 and review of federal convictions under 28 U.S.C. § 2255 (1970). Then, in Davis v. United States, 411 U.S. 233 (1973), a § 2255 review of a federal conviction, the Court was asked to reconcile the implicit deliberate-bypass standard previously applied to § 2255 with the stricter standard explicitly set forth in FED. R. CRIM. P. 12(b), which provides that all defenses not raised are automatically forfeited, except for "cause" shown. The Court reasoned that in approving the stricter forfeiture provision of rule 12(b), Congress must have intended to "repeal" the more generous deliberate-bypass standard of § 2255; otherwise, § 2255 would completely negate the effect of rule 12(b). Accordingly, the Court concluded as a matter of statutory interpretation that the forfeiture provision of rule 12, including its narrow exception for "cause," was intended to apply both at the criminal trial itself and on collateral attack under § 2255. 411 U.S. at 241-42. Unfortunately, the same argument cannot be made in a case like *Francis* involving review of a *state* conviction under § 2254: the Louisiana rule of procedure in *Francis* requiring grand jury objections to be raised before trial was never approved by Congress. Nor is there anything inconsistent about the notion that Congress intended a broader standard of review to govern under § 2254 than exists for the trial itself under Louisiana law.

Moreover, it might also be argued that the Court in *Davis* and *Francis* was simply repudiating the deliberate-bypass standard of *Fay v. Noia* and replacing it with a new statutory interpretation of 28 U.S.C. §§ 2254-55 to the effect that federal and state rules of procedure for the timely assertion of constitutional defenses are now to be treated as *adequate state grounds* for purposes of federal habeas review. *See* Estelle v. Williams, 425 U.S. 501, 521-22 n.5 (1976) (Brennan, J., dissenting). If that is what the Court was really doing, however, one must wonder where it found the exception to the Louisiana rule for a showing of "cause," since the state rule

A third problem with the nonconstitutional explanation of *Davis* and *Tollett* advanced above is that the Court's treatment of retroactivity suggests that it *does* recognize constitutional differences between forfeiture for convictions based on trial and forfeiture for convictions based on guilty pleas. There is, after all, an intimate connection between doctrines of retroactivity and forfeiture: if a newly recognized defense is constitutionally retroactive, a defendant who was convicted in the past is constitutionally entitled to raise the claim now as a defense to his conviction. Additionally, a state would have no constitutional authority in that event to enforce a contrary rule of retroactivity or to provide that the defendant's failure to raise the defense in the past constituted forfeiture of that defense. Conversely, if a newly recognized defense is not constitutionally retroactive, then a defendant who was convicted in the past is not entitled to raise the claim now as a defense to that conviction. By the same token, a state could provide that the defendant's failure to raise the defense in the past constituted forfeiture of the defense, despite his having had "cause" for being unaware of the defense at the time of his conviction.

Interestingly, in the area of retroactivity the Court has drawn a constitutional distinction between convictions based on trials and convictions based on guilty pleas. In *Jackson v. Denno*,[62] for example, a New York defendant was convicted at trial on the basis of a dubious procedure for determining the validity of his out-of-court confession.[63] The Court reversed the conviction, holding that the judicial procedure at issue violated the defendant's privilege

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itself contains no such exception and Federal Rule 12 applies only in federal criminal proceedings. Consequently, if the defendant in *Francis* had a right to make a showing of "cause" despite the state rule of procedure to the contrary, it is most probably because, as a *constitutional* matter, the stricter Louisiana rule—which would have cut off his defenses without regard to any showing of "cause"—was implicitly held to be an inadequate state ground; at the very least, it suggests that, as a matter of statutory interpretation, the Court wished to avoid the constitutional implications of upholding an airtight system of forfeiture of that kind. These constitutional implications were certainly uppermost in the mind of Justice Brennan. *See* 425 U.S. 536, 548-49 n.2 (Brennan, J., dissenting).

62. 378 U.S. 36 (1964).

63. Consistent with the New York practice at that time, the trial court had submitted the issue of the voluntariness of Jackson's confession to the jury along with the other issues in the case, without ever making any independent determination of its own as to its admissibility. The jury was instructed that, if it found the confession to be involuntary, it was to disregard the confession entirely and determine guilt or innocence from the other evidence presented. The procedure was constitutionally defective because, with respect to confessions the jury determined to be inadmissible, the procedure placed unreasonable demands on what was determined to be the jury's limited ability to disregard confessions once it had heard them. 378 U.S. at 374-75.

against self-incrimination. The Court later held that this decision was constitutionally retroactive to convictions based on trials conducted in the past, despite the fact that defendants there had failed to assert the defense at the time. The Court apparently concluded that the *Jackson* defense should apply retroactively because it involved a constitutional defect that affected "reliability of the fact-finding process"[64] and because defendants should be excused for failing to anticipate the change of law.

Yet in *McMann v. Richardson*,[65] involving precisely the same defense, the Court came to the opposite conclusion with respect to convictions based on guilty pleas. The defendant in *McMann*, like the defendant in *Jackson*, had given the New York police an incriminating confession at a time when the New York courts still employed the same dubious procedure later declared invalid in *Jackson*. Instead of standing trial, however, the defendant in *McMann* pleaded guilty; later, in response to the decision in *Jackson*, he challenged his conviction, arguing that he would never have pleaded guilty if the state had provided a constitutionally acceptable procedure at trial for determining the validity of his confession. The Supreme Court accepted his allegations, thereby assuming that the defendant would not have pleaded guilty except for the constitutional defect in the state's procedure; in other words, it assumed that the defect affected the factual "integrity" of the defendant's plea. Nonetheless, the Court denied relief, holding that the decision in *Jackson* was not constitutionally retroactive to defendants convicted on pleas of guilty.[66]

In short, although the defendants in *McMann* and *Jackson* were assumed to have been convicted because of the same constitutional defect, and although both could show "cause" for not having asserted

64. Johnson v. New Jersey, 384 U.S. 719, 727-29 (1966). *See also* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966); Linkletter v. Walker, 381 U.S. 618, 639 & n.20 (1965).

65. 397 U.S. 759 (1970). For the sake of simplicity, I shall refer to *McMann* as if it involved a single defendant, although in fact it represented a collection of consolidated cases involving three defendants, all similarly situated.

66. The Court stated at one point that the procedural defect in *McMann* had no bearing on the "accuracy" of the defendant's plea. 397 U.S. at 773. But immediately thereafter the Court conceded that the controlling factor in the case was not the "integrity" of the plea at all, but rather the state's interest in the finality of convictions based on guilty pleas. For the view that the defects in *McMann* and its companion cases did affect the "integrity" of the defendants' pleas of guilty, see 397 U.S. at 782-86 (Brennan, J., dissenting); Parker v. North Carolina, 397 U.S. 790, 805 n.9 (1970) (Brennan, J., dissenting). *See also* notes 31 & 40-41 *supra*. For the view that, as far as the "integrity" of the convictions is concerned, there is no rational distinction between convictions based on trial and convictions based on guilty pleas and no rational basis, therefore, for different standards of retroactivity, see Note, *supra* note 4, at 1443-44.

the defense earlier, a distinct constitutional rule of forfeiture was applied in each case. Hence, like *Francis*, *McMann* supports the view that there is a constitutional difference in the extent to which a state can provide for the forfeiture of criminal defenses depending on whether the case involves a conviction based on guilty pleas or a conviction based on a trial verdict.

This discussion brings us back to our earlier question: what is the constitutional difference between a conviction based on a guilty plea and a conviction based on trial that justifies different rules of forfeiture? Why, as a matter of domestic policy, would the federal courts adopt a broader rule of forfeiture for convictions based on guilty pleas than for convictions based on trial? Why, as a constitutional matter, would the Court hold that a state has no power to adopt as broad a rule of forfeiture for convictions based on trials as it might wish to adopt for convictions based on guilty pleas? The defendant's interest appears to be the same in each case: a defendant (like McMann) who pleads guilty because of a constitutional defect in a procedure by which he would have been tried is in precisely the same position as a defendant who is tried and found guilty because of the defect; in each case, he has been convicted because of a constitutional defect in the process; in each case, he is in a position to argue that he would not have been convicted had the constitutional defect not existed. Thus, from the *defendant's* standpoint, there is no difference between a conviction based on a guilty plea and a conviction following trial that would justify different constitutional standards of forfeiture.

The real difference lies with the state's interest. The state has important interests in the finality of all convictions, whether based on guilty pleas or on verdicts following trial. If a defendant is permitted to set aside a conviction based on a guilty plea because of a defense based on a defect that could have been cured if identified earlier, he injures the state in two ways: he puts the state to the burden and expense of having processed an invalid guilty plea, and, more importantly, he puts the state in the position of now having to present a case it might no longer be able to prove. Similar state interests are affected whenever a defendant is permitted to set aside a conviction based on a trial because of a defect that could have been cured if complained of earlier. The court referred to those two interests in *Davis*:

> If its [rule 12(b)(2)] time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and ex-

> pense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.[67]

If anything, the state's interest in seeing that the defendant asserts his curable defenses in time to avoid "the burden and expense" of engaging in judicial procedures that will subsequently have to be set aside is even stronger in the context of convictions based on trials: if a defendant who stands trial, for example, does not assert a grand jury defense until after the trial is completed, he will have put the state to the considerable burden and expense of a trial that will now be invalidated. On the other hand, if a defendant who has pleaded guilty does not assert a grand jury defense until after entry of his plea, the prejudice to the state is considerably less, because the burden and expense of an arraignment (which takes only a few minutes) is considerably less than the burden and expense of a trial. Consequently, the justification for the constitutional distinction between the rule of forfeiture for convictions based on trial and the stricter rule of forfeiture for convictions based on guilty pleas must lie elsewhere than with the state's interest in avoiding unnecessary proceedings.

The second state interest—that curable defenses be asserted in a timely fashion so that the state does not have to prove its case "at a time when reprosecution might well be difficult"—does justify the constitutional distinction. The state's interest here is stronger and more crucial with respect to convictions based on guilty pleas than with respect to convictions based on trials. The state is typically in a much worse position vis-à-vis a defendant when a guilty plea is set aside than when a trial verdict is set aside. As discussed earlier,[68] the state, obtaining a conviction based on a guilty plea, rarely prepares its case as carefully as it would for a trial. As a result, if a guilty plea is set aside, the state may well find that its files are inadequate, that the trail of evidence has grown cold, and that it is no longer in a position to prove the defendant guilty beyond

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67. 411 U.S. at 241. *See also* 411 U.S. at 254-55 (Marshall, J., dissenting): "I do not deny that there is an interest in enforcing compliance with reasonable procedural requirements by a system of forfeitures, so that claims will be raised at a time when they may easily be determined and necessary corrective action taken."

68. *See* text at note 45 *supra.*

a reasonable doubt at trial. Consequently, in weighing the defendant's interests in asserting constitutional defenses against the state's interest in the finality of guilty pleas, it makes some sense to conclude that the state has authority to provide for the forfeiture of all curable defenses, regardless of whether the defendant was reasonably capable of raising the defense before entering his plea.

The state's interest in avoiding reprosecution is not nearly so strong in the case of retrials. When a conviction is set aside following a trial, the state need not build its case from scratch; it has already completed the investigation and preparation required to take the case to trial. Moreover, if witnesses have become unavailable in the meantime, the state may offer as evidence their testimony from the original trial record. Consequently, in balancing the defendant's interest in asserting constitutional defenses against the state's interest in the finality of convictions following trial, it makes some sense as a matter of policy to provide for the forfeiture of only those defenses that the defendant was reasonably able to raise before trial, leaving it open to him to show "cause" for not having asserted his defenses earlier. And, given this balance of interests, it may also be appropriate, as a constitutional matter, to conclude that the state has no power to provide for the forfeiture of constitutional defenses not raised before trial if the defendant can show "cause" for having failed to assert them in timely fashion.[69]

### B. *Defenses That Must Be Raised by the End of Trial*

As mentioned earlier, rule 12 divides all antecedent defenses into three classes: (1) those that must be raised before trial (discussed in the preceding section); (2) the defenses of failure of subject-matter jurisdiction and of failure to charge an offense, which may

69. These two rules of forfeiture—a strict rule for cases terminating in guilty pleas, and a more lenient rule for cases terminating in guilty verdicts—obviously rest on *general assumptions* concerning the state's different degrees of interest in the finality of convictions. That is, the rules assume that the state generally has a stronger interest in the finality of convictions based on guilty pleas than in the finality of convictions based on trial verdicts. As with all general rules, of course, this inevitably means that the two rules will be underinclusive in some cases and overinclusive in others. Some of this lack of "fit" or precision can perhaps be remedied by refining the rules. Thus, one might decide that the ordinary rule of forfeiture for guilty pleas ought not apply where a defendant can actually show that the state has no interest in finality. *See* Dukes v. Warden, 406 U.S. 250, 264-71 (1972) (Marshall, J., dissenting) (defendant has a constitutional right to assert his defenses following a plea of guilty if he acts promptly and before the state could conceivably suffer prejudice). Similarly, one might decide that the ordinarily more lenient rule of forfeiture for convictions based on trial verdicts ought not apply where the state can actually show special prejudice. Nonetheless, despite such refinements, there will always be some lack of precision in this area because of the difficulty of proving or disproving actual prejudice in specific cases, and because of the resulting need to resort to presumptions of prejudice for general categories of cases.

be raised "at any time during the pendency of the proceedings"; and (3) a residual class of defenses containing all those not specifically set forth in the first two classes. The rule does not explicitly state when these residual defenses must be asserted, but the relationship among the three classes implies that defenses in this third class must be asserted before the end of trial:

> These . . . defenses [of the third class] . . . may at the option of pleader be raised by a motion to dismiss [before trial], but he is not required to raise [them] at that time and may assert them at the trial under a plea of not guilty. Indeed the rule itself is silent on when they must be raised. Unlike defenses and objections in the [first] class, they need not be raised by timely pretrial motion. Unlike defenses and objections in the [second] class, they may not be noticed at any stage during the pendency of the proceeding. The sensible resolution is that the matters now being considered are waived if not raised at the trial.[70]

The rule is also silent on the consequences of the defendant's failure to make a timely assertion of defenses in this third class; it does not specify, as it does with defenses in the first class, that failure to assert them in a timely fashion "shall constitute waiver." However, because it is implicit in the rule that a defendant must raise these defenses before the end of trial, it is fair to assume that his failure to do so precludes him from asserting them later.[71]

The rule also does not describe or enumerate the particular defenses that fall within this residual class. Indeed, if it were not for the Advisory Committee Notes, one might have assumed that some defenses intended to be included in this class fell within the first class as defenses relating to defects in the institution of the prosecution. But in their official notes, the framers of the rule set forth specific examples of the defenses they intended to be included within the third class—"former jeopardy, former conviction, former acquittal, statute of limitations, [and] immunity . . . ."[72] These, then, are the defenses that may be raised either before or during trial, but may not be raised after the conclusion of trial.

The reader has probably noticed that these are all defenses that, if asserted before trial, would constitute complete defenses to the crimes charged. Indeed, the residual defenses that are *constitutional* in origin[73] seem to correspond exactly with the group of "incurable"

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70. 1 C. WRIGHT, *supra* note 54, § 193, at 410.

71. *See id.*, § 193, at 410 n.71. *But cf.* note 74 *infra.*

72. *See id.*, § 193, at 402 n.38.

73. The defenses of former jeopardy, former acquittal, former conviction, and bars to prosecution based on certain kinds of immunity and on presidential pardons are constitutional in origin.

defenses that, according to *Blackledge*, cannot constitutionally be forfeited by a plea of guilty. The question, therefore, is this: if a defendant who has been convicted on a plea of guilty has a constitutional right under *Blackledge* to raise certain defenses to his conviction at any time, how can a defendant who has been convicted at trial ever be prohibited from raising those same defenses to his conviction? If a defendant cannot constitutionally forfeit a defense by pleading guilty, how can he forfeit it by going to trial?

In the last section we identified two reasons for requiring a defendant to assert certain defenses before trial: (1) to relieve the state of the burden and expense of an unnecessary trial, and (2) to relieve the state of the burden of trying to prove its case against the accused at a time when reprosecution may be difficult. The second interest is obviously irrelevant here, for to say that a defense is complete is to admit that the state is incapable of ever obtaining a conviction. Hence, in this respect, the state is in precisely the same position vis-à-vis the defendant when a completed defense is asserted late as when it is asserted early. The first interest is more significant here: the state has an administrative and financial interest in avoiding unnecessary trials. If a defendant who has a complete defense is permitted to delay his assertion of the defense until the state has already tried him, he will have caused the state to go to trial in vain. Conversely, if the state wishes to avoid the burden of futile proceedings, it must make the defendant pay a price for failing to raise the defense in a timely fashion. The state has a variety of sanctions at its disposal for that purpose, one of which is to prohibit the defendant from raising at trial any defense that he could have raised earlier and that would have rendered trial superfluous. Indeed, that is precisely the sanction that rule 12 uses to force the defendant to raise the curable defenses discussed in the preceding section.

Still, there are at least two problems in using the same rationale here to justify the forfeiture of complete defenses. First, we have yet to establish whether the state's administrative and financial interest in avoiding unnecessary proceedings is ever sufficient by itself to justify the forfeiture of constitutional defenses. The fact that the state has such an interest does not mean that the states's interest outweighs the defendant's constitutional interests. Although *Davis* and *Francis* stand for the proposition that the state's interest in cutting off constitutional defenses can outweigh the defendant's interest in asserting them, those cases both involved "curable" defenses; hence in addition to having an administrative or financial interest in their

timely assertion, the state there also had an interest in avoiding the burden of trying to retry its case at a time when reprosecution might be difficult.

Secondly, even if the state's administrative and financial interest in avoiding unnecessary proceedings is sufficient to justify the forfeiture of constitutional defenses (and it probably is), rule 12 cannot be justified on that basis, because it is not designed to further that interest. To protect the state from the burden of superfluous proceedings, the rule would have to treat complete defenses the same way it treats curable defenses, by requiring that they be asserted *before* the trial commences; in that way, it would protect itself from the "burden and expense" of commencing a trial that will inevitably fail. But rule 12 does not require that complete defenses be raised before trial; rather, it permits a defendant to raise such defenses at any time up to the end of trial, long after the state has expended the administrative and financial resources it would presumably wish to save.

In short, we are forced to conclude that there is no constitutional justification for the forfeiture of complete defenses under rule 12. Perhaps the rule could be saved if it were redrafted to protect the state from the burden and expense of superfluous proceedings. Forfeiture might be justified if it were necessary to further a substantial state interest that could not easily be protected by alternative means; but, as the rule now stands, it does not further that interest and cannot be constitutionally justified on that basis. To answer the questions posed earlier, rule 12 is unconstitutional insofar as it provides for the forfeiture of constitutional defenses that cannot be forfeited by a plea of guilty.[74]

74. If our knowledge of forfeiture were limited to this context, we might assume that the forfeiture provision of rule 12(b)(2) was justified by the state's interest in preserving the convictions of persons whom it believes to be guilty of the facts alleged against them (and against whom there is substantial evidence of guilt). But we have already discovered in connection with Blackledge v. Perry, 417 U.S. 21 (1974), that the state's interest in preserving the conviction of a person who may be factually guilty is insufficient to preclude him from asserting complete constitutional defenses. *See* text at notes 36 & 45-49 *supra*. To justify such a rule, something more is required in the way of a state interest, such as showing that the state has relied to its detriment on the defendant's failure to assert the defense in a timely fashion. It is precisely that kind of interest that is absent from rule 12(b)(2) as presently drafted.

Of course, this constitutional defect in rule 12 can be eliminated by reinterpreting the rule to allow for the survival of complete defenses. Thus, without doing too much violence to the language of rule 12, one could construe it to be a rule of forfeiture only for purposes of direct appeal and not for purposes of collateral attack. By that construction, a defendant who fails to assert his defenses by the end of trial would lose the right to raise them on direct appeal but would preserve them for purposes of collateral attack. The difficulty with this solution is that it conflicts

### C. *Defenses That Can Be Raised at Any Time*

Rule 12 recognizes two defenses that can be raised "at any time during the pendency of the proceedings": (1) that the court has no jurisdiction over the subject matter of the offense, and (2) that the indictment or information does not charge an offense. The rule does not define the meaning of "proceedings," but it is generally understood that a defendant may raise such defenses at any time from the commencement of initial proceedings through the exhaustion of collateral remedies.[75] Again, the rule does not distinguish between constitutional and nonconstitutional defenses, but it appears that each of the two defenses recognized by the rule may arise in a constitutional context. Thus, the defendant who is charged with a "minor offense" and set to be tried before a magistrate may move to dismiss for lack of subject-matter jurisdiction, on the ground that the Constitution requires that he be tried in an article III court. Similarly, a defendant who is charged with a speech-related crime may move to dismiss the indictment for failure to state an offense, on the ground that the first amendment precludes the state from making his conduct a crime. Consequently, although these two rule 12 defenses are often nonconstitutional in nature, they are relevant to our inquiry because they may also be derived from the Constitution.

Significantly, these defenses are often "complete defenses" of precisely the kind that will survive a guilty plea under *Blackledge*. For example, if the defendant is charged with conduct that cannot be designated an offense because it is protected by the first amendment, the government can do nothing to "cure" the defect because the Constitution prohibits the state from making the defendant's conduct a crime. To that extent, by treating such defenses as nonforfeitable, rule 12 reflects what we have determined to be an appropriate constitutional balance between the defendant's interest in asserting such defenses and the state's interest in cutting them off.

To be sure, the state does have a legitimate interest in avoiding the "burden and expense" of proceeding with a trial that will eventually be terminated because of an antecedent defect in its case; accordingly, if the state wished to do so, it might have the constitutional authority to require that all antecedent defenses, both curable and

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with the Court's construction of rule 12 in other contexts. Thus, in Davis v. United States, 411 U.S. 233 (1973), the Court held that the explicit forfeiture provision of rule 12 applied both on direct appeal and on collateral review. There is no reason to believe that the Court would take any different view of the rule's implicit forfeiture provisions.

75. *See* 1 C. WRIGHT, *supra* note 54, § 193, at 403-04.

incurable, be asserted before trial, absent a showing of "cause."[76] But, as we have seen, the framers of rule 12 chose not to use the sanction of forfeiture to further that interest, and the state has no other interest that would constitutionally justify the forfeiture of complete defenses. Thus, absent the one state interest that might otherwise justify it, the provision in rule 12 for the survival of such defenses is not only a matter of good policy—it is constitutionally compelled because of the defendant's constitutional interest in asserting the defenses.

Rule 12 goes even further than is constitutionally necessary by providing for the survival of defenses in this last class without regard to whether they are curable or incurable. Both of these defenses can, in fact, arise in a "curable" form. For example, if a soldier questions the competence of a military court to prosecute him for a civilian offense, the state can cure the objection by removing the case to an article III court. Similarly, if a defendant whose conduct is constitutionally punishable objects to the particular way the offense is stated in the indictment, the state might be able to cure the objection by reformulating the charge. In each case, the defendant is raising a constitutional claim that is less than a complete defense under the circumstances.

This feature of rule 12, however, does not present any constitutional problems: the fact that the state is constitutionally prohibited from providing for the forfeiture of complete defenses does not mean that it is prohibited from providing for the *survival* of incomplete defenses; rather, the latter is simply a question of policy. The state is obviously free to be as generous as it wishes in allowing for the survival of defenses, so long as it satisfies minimum constitutional requirements.

## III. The Relationship Between Forfeiture and Waiver

A criminal defendant can lose the right to assert constitutional defenses by forfeiting them or by waiving them. As we have seen, forfeiture occurs by operation of law without regard to the defendant's state of mind and is justified by the state's interest in the finality of convictions. Waiver, on the other hand, is supposedly justified by a completely different principle—that, once the defendant has

76. We have already concluded that forfeiture is not constitutionally justified with respect to a defendant who stands trial, if his failure to raise a defense bearing on the integrity of the guilt-determining process is excusable. *See* text at notes 58-66 *supra.*

made a free and informed decision to forgo his constitutional defenses, he may constitutionally be held to the consequences of his election.[77] Thus, while forfeiture rests on a balance between the defendant's interest in asserting defenses and the state's interest in cutting them off, waiver is thought to be based not on any such calculus of competing interests but on a concept of free choice.

If this view of waiver is correct, it means that a defendant should be constitutionally capable of freely waiving certain defenses, even though the state has no interest that would justify their forfeiture. To test this conclusion, consider the following hypothetical: although a defendant has some reason to believe that he has been denied a speedy trial in violation of the sixth amendment, he nonetheless decides to plead guilty. The judge informs the defendant at his arraignment that, by pleading guilty, he will be waiving his privilege against self-incrimination and his rights to trial by jury and to confront witnesses against him. The judge also informs him that, by pleading guilty, he will also waive any speedy trial defense he might otherwise have. The defendant, after consulting with his attorney, enters a plea of guilty and receives the maximum sentence provided by law for the offense charged. Six months later, after consulting with new counsel, the defendant decides to attack his conviction on the ground that he was denied a speedy trial in violation of the sixth amendment. The prosecution opposes the motion on the ground that the defendant deliberately and freely waived his sixth amendment defense.

It should be clear by now that the speedy-trial defense is one that cannot constitutionally be forfeited by a plea of guilty. Like the due process defense in *Blackledge* and the defense of double jeopardy, the finding that a defendant was denied a speedy trial is a complete defense. As with these other defenses, the only constitutionally acceptable remedy for a speedy-trial violation is dismissal with prejudice. Because the state has no cognizable interest in preventing the defendant from asserting the defense following a plea of guilty, the defendant is constitutionally incapable of *forfeiting* the defense by pleading guilty. The question, therefore, is whether the defendant is constitutionally capable of waiving such a defense.

Now it might be argued that, by enforcing the waiver, the state is not prohibiting the defendant from doing anything he wishes but is merely recognizing a choice that he has already made. But that

77. For an attempt to justify waiver in terms of free choice, see Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEXAS L. REV. 193 (1977).

begs the question. Obviously, if the defendant were still satisfied with the decision he made at his arraignment, he would not be attacking his conviction. The real question is why the defendant's wishes should be defined by his original decision, rather than by his present decision. What is the constitutional justification for preventing the defendant from changing his mind? Whatever the answer, it cannot be said that the state is merely giving effect to defendant's own wishes.

To be sure, the state may always have an expectation interest in preserving a conviction against a defendant it believes to be guilty, and the fact that the defendant may have a complete defense to his conviction does little to derogate from that interest. But we have already seen that, absent a showing of actual prejudice, the state's mere expectation in the finality of a conviction is not sufficient by itself to justify the forfeiture of a complete constitutional defense.[78] If this interest was insufficient in *Blackledge* to justify forfeiture, why should it be sufficient here to justify waiver? Is there any reason to believe the state lost anything less by the defendant's change of plea in *Blackledge* than it would by his change of mind here, or that the defendant gained anything more by changing his plea in *Blackledge* than he would by changing his mind here? If not, then, with one exception discussed below, a defendant who is constitutionally incapable of forfeiting a defense by pleading guilty must also be deemed incapable of waiving it.[79]

The one situation in which the state might be justified in holding a defendant to the waiver of a complete constitutional defense is where the state has relied to its detriment on the waiver. Suppose, for example, that we modify our hypothetical: the defendant is charged with two separate counts (Counts I & II) arising out of separate criminal transactions. Although the defendant has a colorable speedy-trial defense to Count I, he has no such defense to Count II. Moreover, instead of gratuitously waiving his speedy-trial defense (like the defendant in our prior hypothetical), the defendant here enters into negotiations with the prosecutor. The prosecu-

78. *See* text at notes 45-49 *supra*.

79. Admittedly, it can be argued that, although the state's mere expectation of finality ordinarily is not sufficient to override a defendant's interest in asserting constitutional defenses, the state's interest becomes sufficient if the defendant weakens the moral force of his claim by making a conscious and deliberate decision to forgo his defenses. *But see* Dukes v. Warden, 406 U.S. 250, 266 (1972) (Marshall, J., dissenting) (the state's mere expectation of the finality of a conviction is not sufficient to override the defendant's constitutional right to go to trial, even where the defendant has made a conscious and deliberate decision to "waive" his right to go to trial).

tor agrees that the defendant has a good chance of prevailing on his speedy-trial defense to Count I; on the other hand, the defendant agrees that there is a strong probability that he will be convicted on Count II if he goes to trial. Accordingly, because of certain favorable sentencing provisions under Count I, the prosecutor and defendant reach an agreement: the prosecutor agrees to dismiss Count II if the defendant agrees to waive his speedy-trial defense to Count I and plead guilty to Count I. The defendant accepts the offer and explicitly waives his defense in the course of pleading guilty to Count I. The question now is whether the defendant is still constitutionally entitled to disregard the waiver and challenge his conviction on speedy-trial grounds.

The answer depends on whether the state now has a sufficient interest in the finality of the conviction to uphold the defendant's waiver of a complete defense. At first glance, the state's interest in finality here appears to be no greater than its interest in *Blackledge*: here, as in *Blackledge,* the defendant is asserting a defense to Count I that, if valid, would preclude the state from ever obtaining a valid conviction against him at trial. On the other hand, this case is significantly different from *Blackledge,* for in that case the state could not have *detrimentally* relied on the guilty plea, because when the conviction was set aside in *Blackledge* the state lost nothing more than it would have inevitably lost at trial. Here the state has given up something of value—an opportunity to convict the defendant on Count II—in return for the defendant's waiver of his speedy-trial defense.

To be sure, if the defendant were to breach his plea agreement by asserting his speedy-trial defense to Count I, the state presumably would then be free to prosecute the defendant on Count II. But, by that time, the state might no longer be able to prosecute the defendant successfully. If the state relied on the defendant's waiver by allowing its criminal investigation and trial preparation on Count II to lapse, it would no longer be in as favorable a position as before the waiver to prove the defendant guilty at trial. Its prosecutorial position on Count II would have deteriorated because of its reasonable assumption that it would never have to go to trial on that charge, and it would face the risk that Count I would be dismissed altogether because of the speedy-trial defense. Thus, in contrast to *Blackledge*, the state in our hypothetical case could lose the opportunity successfully to prosecute the defendant for either offense if he were allowed to assert his speedy-trial defense.

Interestingly, this rationale for "waiver" begins to look very much

like the rationale for "forfeiture" in *Tollett*. In both our hypothetical case and *Tollett*, the defendant engaged in conduct that led the state to believe that it would never have to prove its case against him at trial; the defendant then raised a constitutional claim that, if accepted, would restore the state to the position of having to prove its case at trial. In both cases, the defendant's belated claim would put the state in a worse position with respect to its ability to prove him guilty at trial than if he had asserted his claim earlier. Accordingly, the constitutional result should be the same in both cases: the state's interest in preserving its opportunity to prosecute the defendant justifies foreclosing him from asserting his constitutional claim.[80]

If this analysis is correct, it leads us to some general conclusions about the nature of waiver. It means that the waiver of constitutional defenses is not justified by a concept of free choice. If it were simply a matter of choice, then our first hypothetical defendant, who gratuitously waived his speedy-trial defense in the course of pleading guilty, would be prohibited from challenging his conviction on speedy-trial grounds. Yet this analysis also indicates that waiver is justified in some cases; otherwise, our second hypothetical defendant, who waived his speedy-trial defense to Count I in return for the dismissal of Count II, would be permitted to challenge his conviction on Count I on speedy-trial grounds. Ultimately, this analysis shows that the waiver of constitutional defenses, like the forfeiture of such defenses, is justified if, and only if, the state can prove that it has relied to its serious detriment on foreclosing the defendant from later asserting his constitutional defenses.[81]

Conversely, this analysis also permits us to draw some final conclusions about the nature of a forfeiture. We have assumed until now that there are certain constitutional defenses—such as in *Blackledge*—that a defendant is constitutionally incapable of forfeiting by pleading guilty. Yet we concluded in our last hypothetical that a

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80. It is tempting to argue that the defendant should be allowed to discover whether his defense would have been valid, and, if valid, to have his conviction set aside on the ground that the facts *now* show that the state did not rely to its detriment on the waiver. Unfortunately, there is a fallacy of time in the argument: the bargaining between the prosecutor and the defense was based on their then-mutual ignorance about the validity of the defense; the prosecutor gave up what was perceived to be a *chance* to convict the defendant on Count II in return for what was perceived to be the defendant's chance to dismiss Count I. At that time, they both had an interest in being able to negotiate a mutual settlement of the disputed defense; consequently, if the defendant is now permitted to renege on his bargain and litigate the defense, he puts the prosecutor in the position of having given up something of value—what was once perceived to be a significant chance of convicting the defendant on Count II—in return for nothing.

81. *See* text at notes 45-50 *supra*.

defendant can waive such defenses to a charge if the waiver is part of a negotiated settlement of other outstanding charges. Hence the question: if a defendant can waive a complete defense as part of a negotiated settlement, why can he not also forfeit the defense by pleading guilty under the same circumstances?

The answer should now be obvious: if a defendant can waive a complete defense to a charge by making it part of a negotiated settlement of other outstanding charges, he can also forfeit the complete defense by pleading guilty to the charge as part of a negotiated settlement of other outstanding charges.[82] Indeed, the same principles control in each case. In the case of waiver, a defendant cannot lose the right to assert a defense unless he leads the prosecution to rely on his representation that he will not assert the defense. But if the prosecution detrimentally relies on the waiver, then the defendant can be held to his decision, even if complete constitutional defenses are involved. Similarly, a defendant can forfeit the right to assert incomplete defenses by pleading guilty if his plea reasonably leads the state to rely on the fact that the case will never go to trial. By the same token, he can also forfeit complete defenses to a charge if, by his conduct, he leads the state to believe that it will not have to take him to trial on other outstanding charges.[83] The calculus is the same in each case.

82. *See* Gaxiola v. United States, 481 F.2d 383 (9th Cir. 1973) (defendant cannot challenge a guilty plea on the basis of a *Blackledge*-type defense if it appears that he pleaded guilty as part of a negotiated compromise with the prosecution involving other outstanding charges). So far we have discussed the defendant who pleads guilty to an offense to which he has a complete defense as part of a negotiated compromise of other charges to which he has no such defense. But the question of forfeiture can also arise in the opposite context: a defendant pleads guilty to a charge to which he has *no defense* as part of a negotiated compromise of other charges to which it later appears that he has a complete defense. The question then is whether he may challenge his plea to the former charge on the ground that it was induced by the threat of prosecution on other charges to which he now has a complete constitutional defense. In my judgment, the question should be answered in precisely the same way it was answered in the *Brady* trilogy: the defendant has no right to challenge a guilty plea on the ground that the plea was induced by antecedent constitutional defects if, as a result of the challenge, the prosecutor now has to go to trial against the defendant on the charge to which he pleaded guilty. *See* United States v. Hawthorne, 532 F.2d 318 (3d Cir. 1976). *But see* Alschuler, *supra* note 2, at 21 n.68.

83. The courts have adopted different standards to determine when, in pleading guilty to a charge, a defendant reasonably leads the prosecution to believe that the conviction will never be set aside and that the prosecutor, therefore, will never have to go to trial against him on other outstanding charges. Some courts require a showing that, in pleading guilty to a certain charge, the defendant explicitly waived his complete defenses to that charge; others consider it sufficient to show that the plea to the charge was part of a negotiated settlement between the prosecution and the defendant of other outstanding charges. *Compare* United States *ex rel.* Ennis v. Fitzpatrick, 438 F.2d 1201 (2d Cir. 1971) (defendant does not forfeit a complete defense to a charge by pleading guilty to the charge unless he explicitly waives the defense), *with* Ouillette v. United States, 435 F.2d 21, 25 (10th Cir. 1970) (defend-

## IV. Conclusion

According to conventional wisdom, a defendant in a criminal case can never lose the right to assert his constitutional defenses unless he "waives" them. Waiver, in turn, is justified on the theory that the state is merely effectuating a free and informed choice by the defendant himself. Accordingly, in order to show that a defendant has waived a constitutional defense, the state must prove that he made a deliberate and intelligent choice, entirely free of coercion, to forgo the defense. Anything less would be an outright "forfeiture" lacking constitutional justification.

It now appears that precisely the opposite is true. It is the principle of forfeiture, rather than waiver, that ultimately explains the loss of defenses, because it provides a theoretical model for weighing the defendant's interest in asserting defenses against the state's interest in foreclosing them. This forfeiture model explains which defenses are or are not lost when a defendant pleads guilty, as well as which defenses are or are not lost when he fails to assert them in a timely fashion.

Ultimately, this model also explains which defenses are (and are not) lost when a defendant goes through the ritual of "waiving" them. The ritual of waiver, by itself, is of no legal consequence. In the absence of prejudice to the state, a defendant loses nothing by engaging in the ritual and is as equally entitled to assert his rights afterwards as before. Hence, the conventional view of waiver—that constitutional rights instantly vanish at the precise moment a defendant declares his wish to relinquish them—is misconceived. The controlling factor in the area of waiver is not the defendant's state of mind, but the effect his decision has on the interests of the state. Thus, the state cannot hold a defendant to a waiver unless it can represent in good faith that it relied to its detriment on his decision

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ant does forfeit a complete defense to a charge by pleading guilty to the charge if it appears that his guilty plea was based on a negotiated settlement of other outstanding charges). Admittedly, whenever a defendant raises a complete defense to a charge to which he has pleaded guilty, the prosecutor may honestly be able to say that he would have charged the defendant with some other offense if he had known that this particular charge was vulnerable. But it is not enough that the prosecutor acted in unilateral reliance on the sanctity of the initial conviction; rather, by analogy to the *Brady* trilogy, the defendant must be shown to have reasonably *caused* the prosecution to rely on the integrity of the conviction. However, the prosecutor should be able to make such a showing without proving that the defendant explicitly waived his complete defense, by demonstrating that the parties engaged in a negotiated compromise of outstanding charges that led the prosecutor reasonably to believe that the defendant would never contest the charge to which he pleaded guilty.

or that it would suffer substantial prejudice if he were allowed to rescind.

Waiver can thus be seen for what it really is—a doctrine that defines the outer limits of constitutional rights. Waiver is not something distinct from the particular rights it circumscribes. It is part and parcel of those constitutional rights, much in the same way that the doctrine of "fighting words" is part of the constitutional right of free speech. Both are doctrines of limitation that define areas in which the state's interests outweigh those of the individual. Accordingly, as with other constitutional limitations, waiver must be justified: the state must come forward with a legitimate and persuasive *reason* for limiting a defendant's constitutional defenses—aside from the meretricious fact that he once made a decision not to assert them. In sum, waiver is part of the broader principle of forfeiture: here, as with forfeiture, the state must demonstrate that its interest in foreclosing constitutional defenses outweighs the defendant's interests in asserting them.